The Evolution of International Legal Scholarship in Germany during the Kaiserreich and the Weimarer Republik (1871–1933)

By Anthony Carty

A. Introduction and Issues of Methodology

The dates 1871, 1918 and 1933 mark two constitutional periods in Germany, but they also mark the only period in history when Germany functioned as an independent State, apart from the Third Reich. During the period 1871 to 1933, an altogether free German intelligentsia and academia could reflect upon the legal significance of that independence. Since 1949 and even after 1989 Germany has seen itself as tied into a Western system of alliances, including the EU and the UN, where virtually all of its decisions are taken only in the closest consultation with numerous Allies and the intelligentsia is tied into debating within the parameters of an unquestionable *Grundgesetz,* or Basic Law. It will be the argument of this inevitably too short paper that the earlier period is not only significant in terms of German international law scholarship, but also stimulating for the general history of international law doctrine. The acute insecurity and unsettledness of Germany in this period provoked an appropriate intensity of international law reflection, although international lawyers rarely took central place in German intellectual culture.

It is not clear why constitutional rupture of 1918–1919 may be so important because changes in government or constitution should not affect the understandings that a country has of international law. The State itself remains eternal. The request to write this article, *i.e.* to explore whether there is anything "*typisch deutsch*" may possibly have had a technical or even antiquarian and quaint aim. It could invite tedious and painstaking efforts to show the distinctiveness of German approaches to such interminably obscure issues as the legal nature of the institutions of, *e.g.* recognition or general customary law,

or treaty, just to mention three at random. The confident expectation abroad might be that systematic, and thorough Teutonic investigations of the very foundations of these issues will ensure that they remain as obscure as always for a very long time to come. These remarks are not made in jest. The sheer industrial scale of the production of collaborative international law doctrine in Germany during the period has convinced the author that no human being can possibly ever have read all of it. The extent of the material will be indicated shortly. Anyway, how would constitutional change increase or decrease the likelihood that German approaches would converge or diverge from those of other countries?

The fact remains that in France and Britain, not to mention the United States of America, German international law doctrine during this period is held to be very significantly different from other countries and for that reason substantially responsible for the fact that Germany waged two major wars against virtually all its neighbors in the period 1914 to 1945. In Britain leading figures such as *Brierly* and *Lauterpacht,* and in France *Le Fur* and *de Dampierre,* whose work was translated into English, argued that absolute doctrines of sovereignty, theories of the will of the State and of the right to war, were co-responsible for Germany's having launched major wars. Numerous other works, written during and after the World War, pointed the finger of accusation at German international law doctrine. This is the theme which the article will devote most attention to exploring. It directs focus to the question how far German international lawyers developed a position on the most hotly contested issue of the time, responsibility for the outbreak of the First World War. It means looking at German international lawyers alongside other disciplines within German intellectual culture and indeed in the wider institutional political context of Germany. The question is what wider place did the ideas of the international lawyers have in German society, and the purpose of this question is to answer the very categorical views that their foreign colleagues have had and probably continue to have until the present.

To lay stress on this internationalist and controversialist approach is to diverge radically from two other very well developed and apparently established views of how this period of the history of German international legal doctrine should be approached. The field is already so full that it is not possible, even in a short article, to proceed without recognizing and commenting on this fact. It may appear invidious to devote a lot of space in a short article to critical reflections on other treatments of the same topic, but my

own approach diverges so radically from the others that some further reflection on the differences of approach is unavoidable. The first approach is to follow what in German is called *Wissenschaftsgeschichte* which might be translated into English as the history of international law as a discipline in Germany. This has been developed by *Michael Stolleis* in the Max Planck Institute for European Legal History in numerous writings on the history of law of German public law and of international law in this very period. A very succinct account of the approach is proved by *Ingo Hueck.*[1] Mention must also be made of the numerous biographical histories of individual international lawyers that have come out of the Max Planck Institute for European Legal History and German universities on this period. For an exhaustive analysis of the field of German international law doctrine, *Wissenschaftsgeschichte* would appear to be essential, given the virtually industrial level of German international law production. Consider the sheer scope of such series as the "Handbuch des Völkerrechts" begun by *Fritz Stier-Somlo,* Professor at Bonn, in 1912, with the cooperation of the leading well-known international lawyers at German universities.[2] This production ran into approximately three thousands pages in the editions in the Aberdeen Law School Library, with publication continuing until well into the Third Reich. There is also the "Encyklopedie der Rechtswissenschaft," also a team work led by *Franz von Holtzendorff,* of Munich, which had numerous very substantial entries on different aspects of international law. For instance, the fifth edition of 1890 had a large entry by *Holtzendorff,* worked over by Professor *Felix Stoerk,* called "Das Europäische Völkerrecht."[3] Closely related to *von Holtzendorf* is the work by Professor *August von Bulmerincq,* of Heidelberg University, "Das Völkerrecht oder das internationale Recht."[4] The seventh edition of *von Holtzendorff* led now by Professor *Josef Kohler* of Berlin University, commissioned Professor *Paul Heilborn,* of Breslau, to produce "Völkerrecht," which was published in late 1914, after the war had begun.[5] This is without mentioning the gigantic

---

[1] *Ingo J. Hueck,* The Discipline of the History of International Law, New Trends and Methods on the History of International Law, JHIL 3 (2001), 194.

[2] *Fritz Stier-Somlo* (eds.), Handbuch des Völkerrechts (1912).

[3] *Franz von Holtzendorff* (ed.), Encyklopädie der Rechtswissenschaft in systematischer und alphabetischer Bearbeitung (5th ed. 1890).

[4] *August von Bulmerincq,* Das Völkerrecht oder das internationale Recht (2nd ed. 1889).

[5] *Franz von Holtzendorff/Josef Kohler* (ed.), Encyklopädie der Rechtswissenschaft in systematischer und alphabetischer Bearbeitung (7th ed. 1914).

"Wörterbuch des Völkerrechts und der Diplomatie," begun by Professor *Julius Hatschek* and taken over by Privatdozent *Karl Strupp*, appearing in three volumes from 1924 to 1929, and running to about 2,700 pages.[6]

How is one to assess the significance of academic production on this scale except in terms of *Wissenschaftsgeschichte?* There is a very significant strength in this approach where *Hueck* objects that the development of the theory of international law needs to understand its own internal dynamic and not become lost or submerged in speculation about the possible impact on legal doctrine of specific historical turning points. Hegemonial and national structures influence the law but cannot determine what becomes long-term within the discipline, according to *Hueck*. He argues instead: "[p]hilosophical and theoretical/historical movements, which may but need not necessarily coincide with political or national historical upheaval are decisive."[7] This is in large measure a justified reaction to *Wilhelm Grewe*'s Epochs of International Law.[8] The work has been, as *Hueck* demonstrates, deeply influential upon the German approaches to the history of international law.[9] He notes how *Grewe* gives a predominant weight to British hegemony in the nineteenth century, which would hardly correspond to the argument that will be developed here, since my assumption will be that since 1870 Germany was the determining focus of international legal doctrine in Europe. The strength of the Frankfurt approach should be that one acquires the tools to assess what were the dominant trends within the discipline itself and who were the most influential figures.

However, this form of investigation has severe dangers of becoming self-referential, provincial and even narcissist. *Hueck* quotes *von Bulmerincq* himself as an authority that international law developed only very late in the last third of the nineteenth century into an academic discipline, a sub-field of public law.[10] While mention is made of *Franz von Liszt*, of whom more later, and *Georg Jellinek*, likewise, the distinguishing factors of their lives appear to be institutional, university pressures,[11] rather than how very serious people

[6] *Julius Hatschek/Karl Strupp* (eds.), Wörterbuch des Völkerrechts und der Diplomatie (1924–1929).

[7] *Hueck* (note 1), 198.

[8] *Wilhelm Grewe*, The Epochs of International Law (2000).

[9] *Hueck* (note 1), 196.

[10] *Ibid.*, 200.

[11] The distinguishing feature of the undoubtedly technically very accomplished study of *von Liszt*, published in the Frankfurt series by *Florian Herrmann*, Das Standardwerk,

responded to their political environment. This leads *Hueck* to make the judgment, which is extraordinary in the light of the above mentioned industrial scale international legal production in which German international law teams were engaged already before the First World War. He says that:

> Scholars like von Liszt or Jellinek were the exception […]. Only a few experts on international law, who were forced as a result of their lectureships to teach on the history of international law were also involved in research or in the international field of international law […]. Those working in the fields of public law and state law were mainly concerned with internal domestic problems. The only area where any importance was still placed on international law was in military and diplomatic training. […] Thus until the Weimar Republic the international law lectureship at Kiel University was the only one in existence at the twenty or more universities in Germany. […] The first significant German expert on international law at this time was Theodor Niemeyer. He founded the first major international law Chair at the Kiel Law School and […] founded the German Society of International Law in 1916/17 […]. Despite this gradual professionalizing during the first decades of the 20th Century, there was no corresponding expansion of the subject of international law at the universities and in the examination regulations.[12]

This approach appears also strange in the light of the foreign impression that German international legal doctrine contributed significantly to the outbreak of the First World War. However, *Wissenschaftsgeschichte* is very useful, because such a virtually quantitative approach to the writing of international law history, is in fact an extremely powerful sociological tool for assessing the real weight of this intellectual work in German society. The *Stolleis-Hueck* approach helps to prepare us for the paradox that German international lawyers could become so misunderstood abroad. Their actual significance within Germany may well have been really, rather little and hence their remoteness from strains of German nationalism, as their remoteness from much less, was not appreciated abroad. However, this is precisely why the *Wissenschaftsgeschichte* approach will not be adopted as the main one in this article. Instead, the stress will be upon assessing the significance of German international law doctrine in the light of how it was perceived abroad in France and Britain. That will mean placing German doctrine alongside other German thinking on international

---

Franz von Liszt und das Völkerrecht (2001). Much more importance is attached to *von Liszt*'s agility in furthering his academic career, which included producing the standard textbooks in criminal and international law, than in understanding his place as a leading international lawyer and politician during the First World War. In the context of the tragic and dramatic nature of modern German history this emphasis is simply morally silly. His position in the eyes of *Brown Scott* and *Hersch Lauterpacht* will be considered later.

[12] *Hueck* (note 1), 203.

relations and Germany's place in the international system. It will also mean exploring how those outside the legal world in Germany perceived German international law writing. To what extent did it address or avoid wider aspects of German culture? To some extent *Wissenschaftsgeschichte* may help one to locate significant figures, but even this is doubtful, given its primary concern with the impact of intellectual activity on university and other academic structures and not on the extent to which it meets challenges outside itself.

Indeed, the whole application of the *Wissenschaftsgeschichte* project to the history of German international law doctrine, something I was privileged to witness personally very close at hand, had always to me a strange character because it appeared, *a fortiore*, to erase the only questions about German international law doctrine in the late nineteenth and early twentieth century which are likely to interest the world outside Germany, *i.e.* did these German lawyers think that the First World War was in some sense legally justifiable and that German conduct of the war was reasonable. Comically enough, this could very well not become a question of *Wissenschaftsgeschichte*, if one takes the so-called long view, as *Hueck* does, that the really significant institutional developments (institutes, journals, university professorships *etc.*) which still leave their mark on contemporary German international legal science only appeared after 1918. That is precisely what *Hueck* has said in the long quotation above. A more disturbing question is whether this is the whole point of *Wissenschaftsgeschichte?* Maybe a reflection on the considerable investigations by *Koskenniemi* of our field will throw more light on the question: *what ever happened to the First World War?*

The second well developed exercise in international legal history has been by *Martti Koskenniemi* in The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870–1960.[13] This work covers more than the period, but the major part of the chapter on German scholarship is within the years 1870 and 1933 and if one considers also the treatment of *Hans Morganthau* and *Carl Schmitt* in the final chapter ostensibly described as "Out of Europe," then *Koskenniemi*'s work comes to well over one hundred and thirty pages,[14] much more space than I have for this article. There is no way one can go around such a vast undertaking. Thus the article on German international law doctrine between 1870 and 1933 seems already to have been written?

[13] *Martti Koskenniemi*, The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870–1960 (2002).

[14] *Ibid.*, 179–265, 413–474.

Koskenniemi's treatment of German doctrine places it in a wider context of an international discipline which he identifies very loosely as a bourgeois, liberal, humanist culture, committed to the role of reason in public life. Beginning with the setting up of the Institute of International Law in 1873, he traces how an international collaboration of scholars aims to "civilize" the relations among States. They are, eventually, overwhelmed by nationalism and mass society, and above all, a cult of force, the dark spirits of the twentieth century. In the spiritual wasteland following 1945, the same profession has abandoned spiritual, idealistic or other intellectual ambitions for a technical pragmatism of functionalist institutional work, particularly the development of the European Union. Now, presumably in *Koskenniemi*'s view, the WTO and numerous specialist judicial tribunals would offer ever more opportunities for international lawyers to lose their identities as academics. As a description of the entire profession in the Western world over a period of one hundred years this is an inevitably haphazard and impressionistic undertaking.

One may easily argue with the detail of the execution of this project, that it lacks any acquaintance with the problems of writing intellectual history.[15] The difficulty with such criticism is, inevitably, that there are no bench marks for how history should be written. It is simply silly of *Bandeira Galindo* to pontificate that "[…] the use made of historiography […] does not mean taking delight in the facts of the past; it is not a search for a lost time or a return to the past due to a disillusionment with present times […]."[16] Says who? *Bandeira Galindo* is right to identify the declamatory, rhetorical, intuitive character of *Koskenniemi*'s historical narrative. In my view he correctively identifies *Koskenniemi*'s fundamental belief that the modern international lawyers, beginning in 1873, were not internationalists, but cosmopolitans, with little faith in States, hoping for increased contacts between peoples.[17] In other words, *Bandeira Galindo* is correct that *Koskenniemi* disregards the first principle of intellectual history, set out by its archpriest *Quentin Skinner*, that analyzing the past with a contemporary outlook can transmute history into myth. The non-historian intellectual is concerned "with what that which was said or written means today."[18] For the historian, the task is to place the interpretation of the

---

[15] *George Rodrigo Bandeira Galindo*, Martti Koskenniemi and the Historiographical Turn in International Law, EJIL 16 (2005), 539, especially 551 *et seq.*

[16] *Ibid.*, 558.

[17] *Ibid.*, 555.

[18] *Ibid.*, 551.

past in its correct context, not transforming the past into a mere reflection of the present.[19]

None of this critique takes away the legitimacy of *Koskenniemi*'s project to set out a immense, nostalgic panorama, but it does highlight a problem with relying upon *Koskenniemi*'s work for my project. He shares the ideals, mood, spirit or whatever of the founders of the Institute of International Law and I do not care about them, one way or the other. His identification goes so far that he nowhere systematically explains exactly what were the foundations of their beliefs, nor what was the exact character of the forces which defeated them. He merely describes and demonstrates their defeat and his own, a complete identification. *Koskenniemi* is worthy of comparison with *Stefan Zweig*'s, "Die Welt von Gestern," a semi-autobiographical work about turn of the twentieth century Vienna, which he wrote in the two years before his suicide in 1941, and which was published posthumously in Sweden in 1942. In other words, The Gentle Civilizer of Nations is a huge achievement, but it will not help to understand how German international lawyers understood the First World War. For *Koskenniemi* the very question is distasteful. His own utter loathing of nationalism and the conflicts which it has engendered means he has not been able to bring himself even to mention the issues about which German international lawyers may have disagreed with their neighbors. *Erich Kaufmann*, as will be seen, was very widely regarded by a few of his colleagues as the one actual German international lawyer significantly responsible for the catastrophe of the First World War. Yet he is transported by *Koskenniemi* to the Platonic dream world of his enforced retirement as a Jew during the Nazi period, in Berlin-Nikolassee until 1938.

Koskenniemi's account of *Kaufmann*'s "Das Wesen des Völkerrechts und die Clausula rebus sic stantibus" (1911)[20] illustrates his own nostalgic, romantic approach, divorced from the realities which are supposed by him to be destroying both his and *Kaufmann*'s world. His first comment on the work is that although it was written before the war, the war did little to discredit its argument, "perhaps to the contrary," adds *Koskenniemi* enigmatically. What is vital to *Koskenniemi* is *Kaufmann*'s own subjective view that when he came to give the Hague Academy lectures in 1935 he, *Kaufmann*, regarded *Wesen* principally as a book in legal philosophy "and later recognised a certain

[19] *Ibid.*

[20] *Erich Kaufmann*, Das Wesen des Völkerrechts und die Clausula rebus sic stantibus (1911).

youthfulness in the delight he had taken there for paradoxical formulations." Together with his later writings "what emerges is an *oeuvre* that seeks to escape from the superficial rationalism and paralyzing dichotomies of liberal thought and to understand – and to control – the world of public and international law as a *concrete reality*."[21] After giving a flow of consciousness account of *Wesen*, much detail of the book, but no historical context, *Koskenniemi* concludes his reflections on the 1935 Hague Lectures, the polished up version of *Wesen*, with the words: "[…] one cannot help thinking that as he assumed as international lawyer, *a priori*, that the actual was the guarantee of the ideal, and that where that did not seem to be the case, one was dealing with an inevitable historical tragedy, this was already an intellectual escape into an imaginary kingdom of dialectics; the compensation of defeat in today's world by a theological faith in victory in tomorrow's."[22] With such reflections it is clear that *Koskenniemi* is identifying himself subjectively with what he intuits to be the mood of *Kaufmann*. These are his personal musings and as such (there are five hundred pages) they have great imaginative and literary effect. I believe, however, the underlying assumption of the book is identical to that of From Apology to Utopia,[23] rational argument is impossible and a study of attempts at it will always descend into the *picaresque*.

Brief mention will be made of *Carl Schmitt* as he is treated in some respects in a similar manner. *Schmitt* provided the most extensive critique of Versailles and did the most to prepare the ground for a Nationalist Socialist international law. One can hardly discuss his work hermeneutically, following the method of *Quentin Skinner*, without assessing the context of a Germany which considered the Versailles Treaty unjust.[24] Yet *Koskenniemi* avoids this completely by putting *Schmitt* in a final chapter of about a hundred pages where he prepares an entirely rational and cogent argument concerning the connection between anti-formalism and imperialism in the American context. *Schmitt* escapes *Koskenniemi*'s nostalgia for pre-World War II Europe; he also escapes the time warp of the book (1870 and 1960) and participates by proxy in post Cold War

---

[21] *Koskenniemi* (note 13), 251.

[22] *Ibid.*, 261.

[23] *Martti Koskenniemi*, From Apology to Utopia: The Structure of international legal argument (2nd ed. 2005).

[24] *Anthony Carty*, Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt, Cardozo Law Review 16 (1995), 1235; *id.*, Carl Schmitt's Critique of Liberal International Legal Order between 1933 and 1945, LJIL 14 (2001), 25.

American debates in the 1990s, disproving, through the vigour and complexity of his own (*Koskenniemi*'s argument) that philosophy of international law is alive and well and, to paraphrase *Mark Twain*, rumours of its death are exaggerated. However, something else has also happened. The epochal events which surely must have provoked the crisis of humanity that concerns the book, the two world wars, have been completely erased from *Koskenniemi*'s narrative: all tragedy and no responsibility. That is no accident. A shrewd historian from a remote Northern country has assessed that international legal history is not ready to discuss the central questions facing international legal doctrine during the period 1870 to 1933, or 1960 or whenever.[25]

B. Germany's Security Situation Following Unification in 1871 as Background to the Outbreak of the First World War: Political History (Hegelianism) and International Law

With the conclusion of this overview of some possible methodological questions, it might now be clearer how one can justify the approach actually adopted in the article. This will look to the complex dynamic of German foreign policy and Germany's relations with its neighbors as the contextual challenge for an assessment of the quality of at least some German international law writing. It is assumed that German international lawyers of this period are of interest today in so far as they contribute to shedding light upon the foreign policy and international relations dilemmas which Germany faced in the period. Germany is taken to have posed problems for other States and mention is already made of British and French reactions after 1914, where it becomes widely assumed that there is in fact, unfortunately, a distinctively German approach to international law.

The starting point of the analysis of German legal doctrine will be, therefore, related to the international situation as seen through some German eyes as the starting point of *Gregor Schöllgen*'s work, "Jenseits von Hitler: Die Deutschen in der Weltpolitik von Bismarck bis heute."[26] In 1875, following French

[25] Witness the outraged reaction to my Leiden article in the subsequent issue of the journal, *Andrea Gattini*, A Rejoinder to Carty's "Carl Schmitt's Critique of Liberal International Legal Order", LJIL 15 (2002), 53.

[26] *Gregor Schöllgen*, Jenseits von Hitler: Die Deutschen in der Weltpolitik von Bismarck bis heute (2005).

parliamentary moves to army reform and expansion, a fever of anxiety broke out in Germany about the prospect of a preventive war against France, favored by *Helmuth Graf von Moltke,* but not by the Chancellor, *von Bismarck. Queen Victoria* wrote to the German *Kaiser, Wilhelm:* "The circumstance that France, or any other neighbor waits for the first favorable moment to attack Germany, is not a sufficient ground for a German attack. Such a Politic could be successful for the moment, but it would necessarily, and rightly arouse the general indignation of Europe and leave Germany without Allies or friends."[27] *Schöllgen* quotes *Andreas Hillgruber,* that, without question the threatening consequences of the grounding of the Reich were catching up with it.[28]

Such citations immediately plunge the author into controversies of German historiography. Is *Schöllgen* not a conservative, revisionist or whatever, historian whose situation a foreign international lawyer is not likely to appreciate? But the nature of all history writing is that one knows the conclusion of the story before one begins to write it, and it is my intention to give great prominence to the work of *Hermann Kantorowicz,* "Gutachten zur Kriegsschuldfrage 1914." He responds to the challenge of the *Reichstag* to provide a legal opinion to respond to Article 231 of the Versailles Treaty,[29] by narrowing down the controversy about the extent of German war aims. *Kantorowicz* accepts that Germany did launch a preventive war, while rejecting the thesis that the war of 1914 was a premeditated German determination to wage a war of aggression to attain some undefined notion of world power. The author was a celebrated liberal German, for a short time a Professor at the present Kiel Law Faculty, who had to emigrate from Germany to England in 1933 because of his Jewish background. The work was published only for the first time in 1967 by *Immanuel Geiss* who was closer to *Fritz Fischer* in the controversy he provoked, and with an accompanying preface from the German President, *Gustav Heinemann.*[30]

So primary questions German international legal doctrine had to ask concerned dilemmas as to how legal foundation and legitimacy could be given to a State brought into existence through war or force, and whether force could continue to be used to defend a State, whose apparent illegitimacy was a

[27] *Ibid.,* 9–11.

[28] *Ibid.,* 11.

[29] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), 28 June 1919, TS No. 4.

[30] *Hermann Kantorowicz,* Gutachten zur Kriegsschuldfrage 1914 (1967).

continuing fact. The striking and shocking fact which arises out of *Hermann Heller*'s work, "Hegel und der nationale Machtstaatsgedanke in Deutschland," is that the formalism of nineteenth century public law theory of the state meant that the development of the idea of *Machtstaat* during and beyond the Bismarck era was through historians and not lawyers.[31] Therefore the whole State ideology which had been conceived to make possible the grounding of the German State, receives the scantest attention from the lawyers. When foreign voices look to representative figures they will mention non-legal figures and identify these as the German international law doctrine. *Heller* points out that through *Gerber* and *Laband, Hegel*'s idea of *Machtstaat* became constricted to a formal definition of the idea of *Staatsgewalt.*[32] Even with the most representative *Georg Jellinek,* who often claimed affinity to *Hegel,* one finds none of *Hegel*'s praise (*Verherrlichung*) of the State. Law for *Jellinek,* notes *Heller,* does not have a creative role, but merely a preservative one.[33]

The lawyers are only interested in identifying a single organ which is the exclusive owner of the legally binding State will, not derived from any other body. This is known as the *Staatsgewalt* (the State Power). This usually came to be the Monarch either concretely or as an abstract organ of the State. The distinctive feature of the State personality, standing above individuals, is that it is expressed in the concept of a unified State will. Despite constitutionalism and divisions of powers, this rested, following *Hegel,* in the monarchical principle.[34] The difficulty was whether the monarchical principle derived from a constitution or expressed an *ex post facto* reflection upon a concentration of power. *Heller* identifies this constitutional law problem as crucial to the identity of Germany in a wider political, cultural sense of the word, because, quoting *Hintze,* the contrast of the monarchical principle to the civil society (*bürgerliche Gesellschaft*) marks Prussia and the German Reich which it grounded, *as forced by the general political situation, to be and to remain for the foreseeable future, to remain as a military state.*[35] The idea of a unified concentration of power in the Monarch is that it was supposed to prepare the State for external struggle,

---

[31] *Hermann Heller*, Hegel und der nationale Machtstaatsgedanke in Deutschland: Ein Beitrag zur politischen Geistesgeschichte (1921), 175.

[32] *Ibid.*, 164.

[33] *Ibid.*, 165.

[34] *Ibid.*, 167.

[35] *Ibid.*, 168 (italics by the author).

by eliminating the danger of internal divisions.[36] As will be seen later, these constitutional deliberations are quite inconclusive for the outbreak of the First World War, because of the contested role of the *Kaiser* in those events.

Heller hereby identifies the influence of *Hegel* not so much in constitutional as in international law, where the huge implications for the closing in of itself of the State as a unity meant that inter-state relations were power and not legal relations. As a closed entity the State did not accept any binding obligation coming from outside itself, a denial of universality.[37] However, the key institution, which determines whether *Hegel* really influenced mainstream international law thinking, concerns the legal definition of war which follows from *Hegel*'s perspective. *Heller* quotes *Pütter*'s definition, that, because of the absolute self-sufficiency of States, each has an absolute right and war does not decide which has right – they both have – but merely which right is fatefully or historically blessed. World history is the world judge.[38] The important point *Heller* identifies is that these clear views are not accepted by the mainstream German international law jurisprudence. *Heffter,* in his authoritative "Das Europäische Völkerrecht," explicitly rejected Hegelianism.[39] International law rests on the common conviction of States and *Heffter* rejected the idea that the only law the State recognizes is what is in its own interest and coming from its own will. For such a perspective there would be no international law at all, only power relations. War may only be an extreme necessity, and then only when one has not brought about the danger oneself.[40]

Heller singles out instead a number of "philosophical historians" as the key connecting points between *Hegel* and German politics. The first significant figure among the historians is *Johann Gustav Droysen.* The nature of the State is power, not law, and State power goes before law. International law has only a place so far as it serves power.[41] After the Frankfurt National Assembly and the rejection of the Crown by *Friedrich Wilhelm IV* he wrote "Prussia and the System of the Great Powers," saying the German question is one of power; the

---

[36] *Ibid.,* 169.

[37] *Ibid.,* 170.

[38] *Ibid.,* 172. *Cf. Karl Theodor Pütter,* Beiträge zur Völkerrechts-Geschichte und Wissenschaft (1843).

[39] *August Wilhelm Heffter,* Das europäische Völkerrecht der Gegenwart (1844).

[40] *Heller* (note 31), 174.

[41] *Ibid.,* 180.

powerlessness is imposed by the Westphalia and Vienna settlements and the task of the monarchical principle is to overcome this. Similarly *Max Duncker* defended the monarchical against the democratic principle, and said, in *Heller*'s words: "*Die Eroberung müsse eine moralisch-politische und militärische sein, die Regierungen müßten vor vollendete Tatsachen gestellt werden.*"[42] As adviser to the Crown Prince from 1861, and for the conflict with Austria in 1866 he advised that it would just about un-right for Prussia not to decide the matter with weapons. The same recommendation came for the 1870 war with France, that Metz and Alsace should be seized, as France will seek revenge anyway. *Heller* treats this figure as key in showing the influence of *Hegel* on *Bismarck*'s actions.[43] The most significant figure of all, the man *Bismarck* appointed to the position of *Leiter des Literarischen Büros* of the government in 1877, is *Constantin Rößler*.[44] His System der Staatslehre is the most direct bridge between *Hegel* and *Bismarck,* deserving of the fullest attention.[45]

Rößler insists the monarchical principle is not there for the people, but to fulfil its own idea of itself.[46] It has no purpose but the preservation of power, and the drive to conquest is not an arbitrary passion, but of a spiritual nature. Vitally, *Rößler* writes: *"Solange ein Volk noch Machtsphären außer sich hat, erscheint ihm sein Dasein als ein zufälliges und unberechtiges.*"[47] This for *Heller* means the imperialism of *Hegel*'s universalism. National instincts of power are always the command of a Higher Spirit. So, in *Rößler*'s words, "*Jede Volksnatur hat das Recht, ja man muß sagen, die Pflicht, den Bereich ihrer Macht so weit auszudehnen, als ihre Kraft reicht, d. h. in Wahrheit und auf die Dauer reicht. […] Die starken Nationen haben aber den Beruf und die Pflicht, die Welt zu teilen.*"[48] War is not a kind of civil legal process. "*Es gibt zur Herrschaft nur einen Titel, die Kraft, und für diesen Titel nur einen Erweis, den Krieg.*"[49] For *Heller,* there is no historical means of demonstrating an exact link between *Bismarck* and *Hegel*, *e.g.* through *Bismarck*'s diaries, but *Hegel*'s

---

[42] *Ibid.*, 183.

[43] *Ibid.*, 185.

[44] *Ibid.*, 187.

[45] *Constantin Rößler,* System der Staatslehre (1857).

[46] *Cf. Heller* (note 31), 191.

[47] Cited in: *ibid.*, 192 *et seq.*

[48] *Ibid.*, 193.

[49] *Ibid.*

theory was *Bismarck*'s practice, and *Hegel*'s ideas were so widespread in Germany at the time, that such was the atmosphere in which *Bismarck* moved.[50]

It is after considering *Rößler* that *Heller* comes to the well known figure of *Alfred Lasson.* "Prinzip und Zukunft des Völkerrechts," is written in the period of the grounding of the German Reich.[51] This is a work of Hegelian philosophy. The very existence of different States provokes them to struggle against one another and war is not decided according to a *Rechtsbuch,* but instead the better State is the stronger State. There is no judge over the States but world history *etc.* Here there is nothing original but its influence is widespread. The unlimited sovereignty of the State makes all legally binding obligations impossible. International law is only a collection of rules of prudence and treaties bind only as long as they do not contradict the interest of either State.[52]

However, *Heller* considers *Hegel* himself the best exponent of his own ideas and brings out in the section *Machtstaatgedanke nach außen* the relationship between his ideas and the old natural law, as well as his ideas on the crucial distinction between defensive and offensive war, including the idea of preventive war. The first issue was to be become crucial as it affected perceptions abroad about German attitudes to compliance with international law. *Hegel,* particularly in the section *Die Verfassung Deutschlands* contrasts the dream world of natural law and the politics of the facts, such as the partition of Poland.[53] Crucial for *Hegel* was to reconcile idealism with realism. So *Hegel*'s solution was, somehow, to argue that material power was to be infused with a spiritual and ideal quality, so that the power of the State was never to be understood merely as military-physical, but also ethical-historical.[54] Traditionally, natural law thinking supposed an opposition between Power and Law, Power and Freedom, between which no mediation was possible. For *Hegel,* there was no conceptual construction, which did not itself mediate with its opposite. All concepts exist in relation and drive one another mutually. Mediation meant dialectic, and *Hegel*'s monism meant: *aller Geist wird Macht, aber auch alle Macht wird geistig.*[55]

---

[50] *Ibid.*, 196.

[51] *Alfred Lasson,* Prinzip und Zukunft des Völkerrechts (1871).

[52] *Heller* (note 31), 197–202.

[53] *Ibid.*, 58.

[54] *Ibid.*, 62.

[55] *Ibid.*, 63.

This depends upon a new idea of law, not basing individual right or State legitimacy on private contract, both of which isolate the individual, but instead the individual should devote himself to a transpersonal State, the national State community, a modern idea of a transpersonal ideal of a national Great Power, where the individual becomes moral. *Heller* notes how *Meinecke* sees the distinction between the old idea of Great Power and the new idea, that in the former the people are simply driven, pulled along, while in the new idea, the drive to power comes from below. So the people no longer see a contradiction between themselves and the Regent, because both are united in a common idea, so that the sovereignty of the people and the monarch are again dialectically won over in the sovereignty of the State. The conflict which natural law sees between people and ruler is overcome in a dialectical unity, where domestic politics are subordinated to an expansive foreign policy.[56]

It is in the context of such an expansive foreign policy that *Hegel* wants to interpret the causes of war. The State should find causes of war even where none exist, to serve not only its people, but also the World Spirit. These causes will be undefinable, because the State can find its infinity and its honor in whatever single detail it cares to lay it. This brings *Heller* to the idea of preventive war. As an example of this "creative searching" for causes of war, *Heller* quotes directly from *Hegel*'s Rechtsphilosophie, para. 335:

> […] the state is in essence mind and therefore cannot be prepared to stop at just taking notice of an injury *after* it has occurred. On the contrary there arises in addition as a cause of strife the *idea* of such an injury as the idea of a danger *threatening* from another state, together with the calculations of degrees of probability on this side and that, guessing at intentions *etc.etc.*[57]

Heller relies on Rechtsphilosophie again for the proposition that if a State is in jeopardy, all the citizens are duty bound to answer the summons to defense. Para. 326 reads: "If in such circumstances the entire State is under arms and is torn from its domestic life at home to fight abroad, the war of defense turns into a war of conquest."[58] *Heller* comments that we have already seen from Die Verfassung Deutschlands that *Hegel* does not distinguish defensive and offensive wars, both equally just and both wars of conquest.[59] The natural law foundation of international law is abstract, and therefore the only way forward

---

[56] *Ibid.*, 66–69.

[57] *Ibid.*, 123, translation and emphasis by the author.

[58] *Ibid.*, 123 *et seq.*, translation by the author.

[59] *Ibid.*

for *Hegel* is to oppose it to the concrete *national-machtstaatliche* principle.[60] *Heller* sees that this tension undermines any idea of restraint on the use of force, because the greater the power of the State, the greater the part it has in the movement of the World Spirit, meaning that *Hegel*'s followers interpreted the doctrine as calling for forceful expansion without any given limits, meaning in contemporary language, imperialism.[61]

Hegel's conflictive dialectic means a rejection of both the natural law tradition from *Grotius* through *Hobbes* and *Pufendorf,* and the positivists such as *Johann Ludwig Klüber* and *Johann Jacob Moser,* the latter having no foundation in a philosophy of history with which to bring together systematically international legal custom and treaties. The positivist and naturalist principles fall apart from one another. However, at the same time what *Heller*'s exhaustive analysis makes clear is that no major German international lawyer, except *Erich Kaufmann,* subscribed to this legal philosophy. The concept of a universal principle of law after the Napoleonic Wars remained in the form of a romantic, universalist principle used to ground international legal science. This was represented most fully in the work of *Kaltenborn von Stachau*'s "Kritik des Völkerrechts."[62]

A systematic attempt by a lawyer to mount an attack on the continued adherence of mainstream international law to the universalism of the Grotian tradition was made in 1888 by *Heinrich Rettich* in his "Zur Theorie und Geschichte des Rechts zum Kriege."[63] This challenges the orthodox views about the legal definition of war, but thereby at the same time serves to show that among lawyers these ideas remained undisturbed. Here is where the method of *Wissenschaftsgeschichte* can come to our aid in identifying significant international lawyers. *Rettich* himself does not appear to be a prominent German academic international lawyer, but his lucid critique of the mainstream helps to focus attention on the fact that the dominant orthodoxy in the question of the legal nature of war was quite indifferent to the new Hegelianism and remained attached to the wider European tradition going back to *Vattel* and *Grotius. Rettich* is going to argue that it is natural law that is responsible for the idea that war is a legal process, and that such ideas are still prevalent in German

[60] *Ibid.,* 126.

[61] *Ibid.,* 129.

[62] *Ibid.,* 126; *Carl von Kaltenborn von Stachau,* Kritik des Völkerrechts nach dem jetzigen Stand der Wissenschaft (1847).

[63] *Heinrich Rettich,* Zur Theorie und Geschichte des Rechts zum Kriege (1888).

international law. History has to demonstrate that war had another role than as a procedural remedy.[64] Instead the authoritative *von Bulmerincq* appears simply to be continuing in the late 1880s in Germany a natural law doctrine, going back to *Grotius, Wolff* and the whole philosophical tradition of international law. His statement: "*Krieg ist seinem rechtlichen Begriff nach ein gewaltsames Rechtsmittel zur Verteidigung des Rechtszustandes zwischen den Staaten,*" raises the complaint from *Rettich* that he does not know if *von Bulmerincq* writes philosophy or law. In fact, *Rettich* does know. The view of war, represented by non-philosophical positivists (*i.e.* non-Hegelians) like *Moser* and *Martens* is that war has legal consequences but is not itself a legal idea. The view of war as a legal institution in *von Bulmerincq*'s sense is that the international legal order is a complete, organically integrated whole. War is then the formal means to protect the whole material system of international law rules. For *Rettich,* this is pure philosophy, following *Pufendorf* and *Thomasius.*[65]

Rettich identifies how *von Bulmerincq* constructs a framework for determining whether there is a justifiable ground for going to war, whether a violation of an individual State right is sufficiently serious to warrant the extreme measure of the resort to war. *Rettich* is very sceptical whether such a distinction is sound in juridical terms, given that war is supposed, in *von Bulmerincq*'s system, to be a legal remedy, part of procedural law. Procedural law does not understand the distinction between legal rights which are worthy of legal enforcement and legal rights which are not so worthy. This type of argument is being used by *Rettich* as a device to undermine the legal technical seriousness of what *von Bulmerincq* is proposing. He admits that there is a scheme for distinguishing the two. Wars should be fought over breaches of the fundamental rights of States.[66]

Von Bulmerincq adheres to the usual catalogue of rights, to existence, respect, equality and the right to communicate and have relations with other States in the international community. It is these fundamental rights which States are entitled to defend by going to war. *Rettich* concentrates an attack on the right to existence, without addressing at a systematic level, that what the framework of fundamental rights of States excludes is precisely wars of

[64] *Ibid.,* XII.

[65] *Ibid.,* 35–36.

[66] *Ibid.,* 50–52.

conquest to upset the status quo. Whatever ambiguity there may be around the edges of the right to respect or to existence, clearly these rights exclude military action to upset the whole status quo in Europe. What *Rettich* has unwittingly revealed is that classical international law, as represented by *von Bulmerincq,* was not so disturbed by the possibility of disagreement about rights that they would effectively abandon the whole idea that there was a complete international legal order in favor of the idea that a discrete law of peace could be disturbed by the phenomenon of war, which was understood as an extra-legal concept encroaching like a fungus.[67]

Rettich devoted special energy to attacking a State's right to existence. Obviously in an abstract sense the State has such a right, but it attends especially to the human beings within the State. However, States will fulfil the duty to protect their populations with different levels of competence, and so a less competent State can lose its right, since international law is there for human beings and not visa versa. Anything else would mean an unconditional right to an unlimited existence, for any State that had ever existed. That would bring public life to a permanent still stand. As international law recognizes all new States that break their way into existence, international law must be consistent about recognizing the forceful means by which new acquisitions come into place. States, even *von Holtzendorff* admits, must prove *lebensfähig* and that can only be tested through the struggle of war. *Rettich* is not following *Hegel,* but makes specific reference to *Rudolf von Jhering* and his celebrated "Der Zweck im Recht."[68] That the ethical standpoint gives way to the historical developments, making not the attack but the defense, *i.e.* the resistance to attack, is what will be judged by world history.[69]

However, if one considers the events of 1914, the assassination of the Crown Prince of Austria-Hungary, the tensions caused within Austria by the Serbian Slav agitation, *Rettich*'s portrayal of *von Bulmerincq*'s thinking is less than persuasive. There was a clear density in regulation in the latter's thought that foresaw crises which could, other things being equal, have made war by the Central Powers justified. Particularly relevant is the right to mutual respect. Very strangely *Rettich* accepts that there is a clear rule of international law requiring respect towards the Head of State and his diplomats. Clearly here

---

[67] *Ibid.*, 53–64.

[68] *Rudolf von Jhering,* Der Zweck im Recht, 2 vols. (1877, 1883).

[69] *Rettich* (note 63), 65–66.

there would be a legal right to respond with war. However, *Rettich* says such a situation is unimaginably antiquated among civilized States, which goes again to show how *von Bulmerincq* cannot demonstrate how his criteria for justifying some and not other wars could be important in contemporary practice.[70] Yet *von Bulmerincq* had clear prescriptions for the eventuality that one State used its ethnic minorities within another State to foment unrest in its neighbor, with a view to subverting its existence. *Von Bulmerincq* defines the State's right to existence comprehensively to exclude a neighbor deliberately damaging its territory, population or government form. He goes on very specifically to cover almost exactly the conditions of 1914:

> Die auf Grund des Stamm- oder Nationalitätsprinzips von einem Staate in einem anderen unternommenen Agitationen, um die stammverwandte Bevölkerung zum Abfall zu bewegen, ist daher als Verletzung eines wesentlichen völkerrechtlichen Grundsatzes zu betrachten. Eine Beihilfe anderer Staaten zu Erhaltung eines in seiner Existenz bedrohten Staates wird freiwillig oder vertragsmäßig, besonders im Falle übernommener Garantie geleistet werden können oder müssen, aber als rechtliche Verpflichtung nicht beansprucht werden können.[71]

Rettich concludes by asserting a right to war which is remarkably close to what is now thought to have been the legal situation in the nineteenth century. For *Rettich* war is a non-legal relationship of States, where each uses its force to compel the other to submit to its will. It has legal consequences, but is not itself a legal relation.[72] Meanwhile, there is actually a legal right of States to go to war wherever they consider it useful or serving their interests, a specific rejection of *von Bulmerincq*'s war as a legal process. *Rettich* argues that this is a consistent practice of States satisfying the standard of customary law and can be formulated as a legal rule:

> Es ist daher das, einerseits aus dieser stillschweigenden, durch die thatsächliche Übung ausnahmslos bewährten Übereinstimmung der Staaten und andererseits aus der eigentümlichen Natur des Krieges beruhende 'Recht zum Kriege' in dem nachfolgend formulierten Satze präzisiert:
>
> Die Überzeugung des Staates, einen für sein Wohl nötigen Zweck nur auf kriegerischem Wege erreichen zu können, ist der stetsfort gültige Rechtstitel zur Erklärung des Krieges […].[73]

---

[70] *Ibid.*, 57–59.

[71] *Von Bulmerincq* (note 4), 202 *et seq.*, *cf. Rettich* (note 63), 63.

[72] *Rettich* (note 63), 72.

[73] *Ibid.*, 142–143.

It would be tedious to go through *von Bulmerincq*'s text again, except to note that the major part of *Rettich*'s discussions concerns what he calls material international law, the rights of subjects, and fundamental rights, which were enumerated in other European countries. *Von Bulmerincq* frequently cites *Robert Phillimore* from England.[74] However, it is worthwhile to quote him precisely on the right to war, *das Recht zum Kriege,* because it appears to cover precisely all elements of the 1914 crisis:

> Zur Anwendung dieses Rechtsmittels ist jeder Staat berechtigt, welcher in seinen wesentlichen Rechten, besonders den allen Staaten völkerrechtlich zustehenden Rechten [the fundamental rights, at 202–206] durch einen anderen Staat verletzt wurde und trotz vorhergehender Anwendung gütlicher oder geringerer gewaltthätiger Mittel, wie Retorsion und Repressalien, Genugthuung nicht erlangen konnte. Auf Seiten desjenigen kriegsführenden Theiles, welcher durch den Krieg sein Recht vertheidigt, heißt der Krieg Vertheidigungs- oder Defensivkrieg, auf Seiten desjenigen, welcher das Recht des anderen Staates verletzte, Angriffs- oder Offensivkrieg. Nur der Vertheidigungskrieg ist völkerrechtlich gerechtfertigt. Von welchem Staat der faktische Angriff ausging, ist gleichgiltig. Die Dauer eines Krieges darf sich erstrecken bis zur Erlangung der Genugthuung und einer Entschädigung, falls die abgenöthigte Vertheidigung mit materiellen Opfern verknüpft war.[75]

Strikingly, *von Bulmerincq* was not able to, or did not care to take account of *Rettich*'s 1888 published book in the second edition of his 1884 text. However, *Franz von Holtzendorff,* revised by *Felix Stoerk,* (*von Holtzendorff* died in 1889) cites *Rettich,* and of course also cites *von Bulmerincq* in his 1890 fifth edition of "Das Europäische Völkerrecht."[76] Indeed one has to remark from the literature cited, in contrast to the much narrower reading of *von Bulmerincq,* the richness of the bibliographical references in terms of philosophy, politics and social theory. *Von Bulmerincq* sticks to strictly legal titles. The irony is of course, that natural law thinking is firmly embedded, as *Rettich* sees, in mainstream German international law thinking at the end of the second decade of the new German Empire.[77] A clear influence of *Rettich* emerges in the text of

---

[74] *von Bulmerincq* (note 4), 202–206.

[75] *Ibid.*, 357.

[76] Published as part of the *von Holtzendorff* (note 3), the international law text revised by *Felix Stoerk.*

[77] *Lauri Mälksoo* has written two almost identical articles in which he critically reflects on what he calls *von Bulmerincq*'s positivist determination to separate law from politics. See: *Lauri Mälksoo,* The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855–1985, BYIL 76 (2005), 383 and *id.,* The Context of

von Holtzendorff, but it does not swamp the fundamental idea of war as a legal process, and *von Holtzendorff* clearly excludes war as an instrument to make a basic change of the status quo. The difference from *von Bulmerincq* is one of emphasis. Each side will maintain that it has legal right on its side, where one alleges that another has violated its rights. War is still defined as forceful self-help of States for the upholding of their rights, which cannot be protected in a peaceful way.[78] It will be seen that in 1914 every word here used will count with all the Powers. The lack of impartial, just arbitration of disputes, and also the inevitable competitiveness and conflict or struggle of interest, which is common to all human life, makes war unavoidable as forceful self-help. However, the progress in the construction of international law can be seen in the fact, that "*Kriege zum Zwecke der Eroberung und eigennützigen Übervorteilung eines schwächeren Staates vom Gewissen der Nationen verworfen werden und der Rechtscharakter des Krieges in seiner bedingten Notwendigkeit stets deutlicher hervortritt.*"[79] Following *von Bulmerincq*, *von Holtzendorff* says that not just any violation of legal right justifies war politically and morally, but only one involving interests which are so high as to put the very existence of the nation in play. Nonetheless in the struggle over rights, it is impossible to say which of the "*beherrschenden geschichtlichen Potenzen*" has the legal right, and it will be decided by whoever is superior in the exercise of force: "*Der Staat ist Rechts- und Machtorganismus und demnach der Krieg das Schiedsgericht der Waffen.*" *Von Holtzendorff* can hear *Hegel* breathing in his ear. One cannot say objectively from among the States waging war, which one of the two alone has the legal right, as one would have to in a normal legal process ("*wie unter den Prozessparteien*").[80]

International Legal Arguments. 'Positivist' International Law Scholar August von Bulmerincq (1822–1890) and His Concept of Politics, JHIL 7 (2005), 181. It appears from his analysis that what *von Bulmerincq* really means is that the idea of law as distinct from the idea of politics, means firm obligation excluding discretion and choice. In fact as *Mälksoo* shows clearly from consideration of numerous of his texts *von Bulmerincq* is preserving precisely the distinction which *Heller* showed Hegelianism wished to fudge, the distinction between law and force. "The maxim of politics is: force rules over law. The maxim of the law is: law rules over force," see *id.*, JHIL 7 (2005), 191–192. Unfortunately *Mälksoo* does not analyze *von Bulmerincq*'s major international law work.

[78] *von Holtzendorff* (note 3), para. 67, 1326–1328.

[79] *Ibid.*, 1327.

[80] *Ibid.*

The major textbook writer of international law who breaks with the usefulness of war as an instrument of legal process is *Emanuel Ullmann,* who succeeded to the Munich Chair of Law (*Professor der Rechte*) of *von Holtzendorff* in 1889. In his "Völkerrecht"[81] he is aware of the view that wars are fought for the enforcement or the defense of "*wirklichen oder vermeintlichen Rechtsansprüchen.*"[82] However, in fact wars are fought to resolve political problems in the international community and for other reasons where it is not possible to see a legal aspect. Therefore, for the definition of war the goal and cause are not decisive.[83] *Ullmann* goes on to note that in practice the language of offensive and defensive war is used and that it is usual to connect the distinction with the question of just grounds for war. He notes that the practice is to identify a war as offensive, when one side has brought about a war without a legal ground. This means the attacker is not the one who declared war or first began the actual hostilities, but the one who actually caused the war, in the sense of making it necessary or unavoidable for the other State. Here he refers to the wars of 1859 and 1866 where in the legal aspect Italy was the attacker, and in the military aspect, Austria. In 1870, France was, in both the legal and the military aspect, the attacker. According to this approach the defensive war is a just war and the offensive war is contrary to law, thus illegal, *i.e.* not a legally motivated war. In practice, however, remarks *Ullmann,* the question whose side is in the Right is regularly doubtful and in any case disputed. As in international law no sovereign State recognizes as authoritative the judgment of another State over its conduct, so the consistent position to take is that each State is entitled to bring about a situation of war, in international law. The war itself will be a kind of judgment of God, which will set out what is in future the practically valid law among the quarreling parties.[84]

This text is very carefully worded and marks a difference in philosophical style from *von Holtzendorff* and *von Bulmerincq. Koskenniemi*'s comments on *Ullmann,* although not directed to his views about war, are very helpful here. He asserts the importance of *Ullmann,* an Austrian, who succeeded to *von Holtzendorff*'s Chair, by saying "German lawyers were moving into more sociological language."[85] His 1898 textbook came to replace *Heffter*'s and to

[81] *Emanuel Ullmann,* Völkerrecht (1898).

[82] *Ibid.,* 312.

[83] *Ibid.*

[84] *Ibid.,* 313.

[85] *Koskenniemi* (note 13), 224.

compete with *Franz von Liszt*'s.[86] In this light *Ullmann* can be taken to say that, in his view, the dominant international law discourse–that of his predecessor for example–uses the language of war as legal processes, but language does not stand up to close scrutiny of State practice. However, he goes on to say the language has been used to describe the most important conflicts involving Austria, and Prussia/Germany in recent years. Wars usually are described as offensive and defensive. By 1898 Europe was in thrall to systems of alliances explicitly defensive in character, which would be in play in 1914. *Ullmann* is still skeptical about the practical use of the dichotomy offensive/defensive. However, his objection is purely sociological, not a historical-philosophical Hegelianism.[87] As he comes to speak of State sovereignty, he concludes by saying that, whatever one thinks of the legal claims of the parties, the outcome of the war will serve as a divine judgment setting down what is to be the law binding on the quarreling parties in the future. In other words, there is no escaping the tendency of States in *Ullmann*'s time to think of war as a legal process and treat its outcome as a legal judgment, even although he himself thinks this is pretty unconvincing and contradictory, given the disputes which persist about who has right on its side and given the central place of the sovereign equality of States and the lack of a legal authority standing over them.

As 1914 draws closer, there are a number of significant textbook writers, whose views are interesting. They appear more superficial than the writers of the 1880s and 1890s, as perhaps theoretical interest declined. This appears particularly true of the person accepted to be the leading figure among textbook writers, *Franz von Liszt.* For instance, in the fourth edition of his "Das Völkerrecht,"[88] he writes that the most extreme means of enforcing a real or supposed claim, the *ultima ratio* for the resolution of international law disputes, is war. *Von Liszt*'s very brief annotated commentary to this one of his bullet-point propositions, of which the textbook consists, includes a reference to *Georg Jellinek*'s view that wars are the main builders of States, but accompanies it by saying world wide peace movements endeavor to achieve permanent arbitration and a development of the law of war restricting its evils

---

[86] *Ibid.*

[87] *Ibid., Koskenniemi* presents *Ullmann* as part of that sociological movement which looked to the "facts" of international society, especially the economy, leading to greater interdependence of States.

[88] *Franz von Liszt,* Das Völkerrecht (4th ed. 1906).

as much as possible.[89] The final edition, completed in December 1917, does not alter its bullet-point in paragraph 39.[90] *Von Liszt*'s commentary is totally changed and now makes the extraordinary lapidary point that the World War proves how particularly the expansion of war technology and the importance of a decision which involves the total defeat of the opponent both serve to make the outcome of the war all the less dependent upon the start of it. Thereby, the rationality of this *ultima ratio* is all the more to be put to debate again.

These are extraordinarily brief remarks to be found in what is supposed to be the leading textbook before the First World War in Germany. Nothing could be clearer than that *von Liszt* is not an intellectual warmonger whose firebrand ideas have driven the world's greatest military power to plunge Europe into catastrophe. Quite the contrary, I think that what needs explaining is the utter mediocrity of this contribution to the thinking about war. *Herrmann*'s already mentioned study speaks of "*die Werkgeschichte des 'Völkerrechts' – eine Erfolgstory.*"[91] *Herrmann* begins by quoting the pacifist *Hans Wehberg*'s review of the ninth edition of 1913, where the latter correctly identifies the direction of *von Liszt* "*Wir Pazifisten dürfen dem Werke noch seine fortschrittliche Gesinnung nachrühmen, die in dem vorliegenden Bande besonders hervortritt.*"[92] *Wissenschaftsgeschichte* can tell that the conditions for the success of a textbook, this one with unusual sales, is to be found in the general scientific field and not the scientific authority of the book itself.[93] This is where the method is important in trying to read the significance of an undoubtedly peaceful orientation of the most popular German international law textbook in 1913.

Herrmann talks vaguely about the wider political culture of Germany at that time, the excessive stress on the Nation State, national consciousness, the primacy of absolute sovereignty–all amounting to an environment which would lead to no particular demand for international law.[94] This speculation is not *Wissenschaftsgeschichte,* because it merely subscribes, as do *Hueck* and *Koskenniemi,* to the "Dark Times" theory of twentieth century history. *Von*

---

[89] *Ibid.,* para. 39, 312–313.

[90] *Franz von Liszt,* Das Völkerrecht (11th ed. 1918), 275.

[91] *Herrmann* (note 11), 140–174.

[92] *Ibid.,* 133.

[93] *Ibid.*

[94] *Ibid.,* 136.

Liszt complains in 1910 that foreign policy is a *terra incognita* for most Jurists,[95] but that could just as well be taken as aggressive campaigning by a very successful publicist who knows he will have an audience. *Von Liszt* was a member of the Prussian Chamber of Deputies. It is possible that *Herrmann* gets closer to the reality when he describes *von Liszt*'s otherwise, in my view, disappointing book, as free from legal philosophical and theoretical thoughts. It refrains from even presenting controversial views and he avoided taking any political stance.[96] None of this adds up to a scientific explanation of the success of *von Liszt*'s book. In particular *Herrmann* does not try to argue that the general intellectual climate in the years immediately preceding 1914 was particularly thin.[97] *Herrmann* might just as well have speculated that *von Liszt* was so popular because he was himself vaguely conciliatory in his tone and avoided controversy, qualities usually esteemed in professional people.

I suggest, as a conclusion to this section of the article, the following partially speculative explanation of where we are left with as regards doctrine in 1914. The 1880s continuance of the natural law doctrine was never formally rejected except by a very intellectually sharp figure such as *Rettich.* More "sociological" figures such as *Ullmann* were skeptical about the categories of *von Bulermincq* and *von Holtzendorff,* in terms of the nature of inter-state conflict. However, Europe was relatively peaceful and a leading figure such as *von Liszt* hoped that the international legal community could be pushed in the direction of more and more arbitration and more restrictive laws of war. We know his views enjoyed great popularity and respect. There was a recognition that the actual treaty practice of the European Powers was built openly upon the classical distinction between defensive and offensive wars. The treaties were for defense and maintenance of the status quo. This was worlds away from *Hegel*'s philosophical-history of futuristic apocalyptic violence. None of the platitudes of *von Liszt* or *Heilborn* or *Ullmann* ever argued that there could be legally a

[95] *Ibid.,* 137.

[96] *Ibid.,* 146.

[97] Another work, equally thin, but well established in the profession is by *Paul Heilborn.* He included a contribution, Völkerrecht, to a 1904 6th edition of *von Holtzendorff* (note 3), 481–578 now edited by *Josef Kohler.* It is equally cursory over the concept of war. It repeats the *von Holtzendorff* perspective, without qualification that war is the means of self help to ensure the enforcement of rights and interest. It is the means to bend the will of other States to a recognition of these interests. At the same time there are no rules over when a war may or may not be waged and there are no international legal causes of war. This is less than a paragraph.

war of conquest in Europe with a view to upsetting the whole balance of power and territorial settlement.

This appears clearer in some presentations of the subject, which were more discursive or argumentative than textbooks. For instance, Professor *Peter Resch*'s "Das Moderne Kriegsrecht der Civilisirten Staatenwelt"[98] sets out the classical view, following *Heffter* and *Bluntschli*, that the cause of a war may be a legal quarrel, but the war itself is a physical struggle of wills. Then he continues: "*Die Frage nach der Erlaubtheit des Krieges überhaupt und nach den Voraussetzungen eines gerechten Krieges im besonderen gehört nicht in die Lehre vom positiven europäischen Völkerrechte.*"[99] This is only to say there is no rule of law which prohibits war as such, and there is no continued discussion of the much earlier international law debates about the just war in the modern European international law. However, *Resch* goes on immediately to say that a most important legal distinction of wars is defensive and offensive. If one is to regard the offensive as unjust but the defensive as just, this must be with an understanding that the offensive party is the one that has first violated the law.[100] In other words, war is still understood as a legally defensive mechanism, with no place for a conquest.

Another study, running into its ninth edition in 1913, *August Quaritsch*'s "Völkerrecht und Auswärtige Politik"[101] follows a similar line. The laws of war cannot pay any attention to the innumerable grounds that can be invented for going to war, whether to defend a legal claim or some other interest, such as nationality, independence or even to serve commercial interests. The grounds given may in any case be only a pretext. For these reasons, the laws of war can ignore the distinctions that are made in practice between legal and illegal wars, defensive and offensive wars. Nevertheless, a vital qualification is added in this book, which is directed in a much more focused way than *von Liszt*'s university textbook, to contemporary debates about foreign policy. Concerning the distinction between offensive and defensive wars, *Quaritsch* writes: "*Dennoch ist der letztere Begriff von großer Bedeutung, weil häufig bei Bündnisverträgen (so auch bei dem Dreibund) der casus foederis, die Verpflichtung zum Beistande, nur Platz greift, wenn der eine oder der andere Staat 'angegriffen'*

[98] *Peter Resch*, Das Moderne Kriegsrecht der Civilisirten Staatenwelt (3rd ed. 1890).

[99] *Ibid.*, para.10, 15–16.

[100] *Ibid.*, para. 11, 16.

[101] *August Quaritsch/Carl Goesch*, Völkerrecht und Auswärtige Politik. Des Kompendiums des Europäischen Völkerrechts (9th ed. 1913).

wird."[102] *Quaritsch* refers back to the 1879 German-Austrian Alliance, published first in 1888, as the European situation appeared to require, so that no one would be in any doubt about the defensive character of the Alliance.[103] All of these propositions remain unaltered from the eighth edition brought out by *Quaritsch* alone, in 1908.[104]

C. Legal Responsibility for the Outbreak of the First World War, English and French Views of German International Law after the Outbreak of War

Article 231 of the Treaty of Versailles provides as follows:

> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

Article 227 provides:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special Tribunal will be constituted to try the accused […]
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality […]

These documents are supported by a Report of the Commission on the responsibility of the Authors of the War and on Enforcement of Penalties.[105] The Report insists that the responsibility of the authors of the war "lies wholly upon the Powers which declared war in pursuance of a policy of aggression, the concealment of which gives to the origin of this war the character of a dark

---

[102] *Ibid.*, para. 70, 150–151.

[103] *Ibid.*, para. 44, 111.

[104] *August Quaritsch/Carl Goesch*, Völkerrecht und Auswärtige Politik, Des Kompendiums des Europäischen Völkerrechts (8th ed. 1908), para. 70, 121–122.

[105] Reproduced in: Carnegie Endowment for International Peace, German White Book Concerning the Responsibility of the Authors of the War (1924), 12, 15 (German White Book).

conspiracy against the peace of Europe. This responsibility rests first on Germany and Austria, secondly on Turkey and Bulgaria. The responsibility is made all the graver by reason of the violation by Germany and Austria of the neutrality of Belgium and Luxemburg, which they themselves had guaranteed."[106]

It is not intended, for reasons of time and space, to explore the question of the violation of Belgian neutrality or the German arguments of necessity. The more general question of the right to war is all that will be attempted to be explored here. Indeed, the response of the German Delegation to the Report did not choose to take issue with the statements about Belgium. As the German Chancellor said in 1914, it was "a wrong to be made good." The response continued: "They regret that during the war this conception was temporarily abandoned and that a subsequent justification of the German irruption should have been attempted."[107]

In the light of the apparently widely held view, that in the Europe of the pre-war there was an unrestricted right to go to war in international law, it is very important to look closely to the terms of the Report by the Commission. Of course, it is possible to say that the legal issue of guilt was itself determined by a Treaty which Germany accepted through signature. However, the language of aggression and pre-meditation is used on its first page.[108] The Report argues that Germany, believing itself to be overwhelmingly superior militarily, used the Sarajevo killing as a pretext with which to provoke a war. Germany supported Austria to put demands to Serbia, which it knew it could not accept. Germany also knew that Russia could not stand aside if Serbia was attacked. So, Germany wanted the conflagration. All of the Entente Powers, including Russia, attempted to mediate, including a Russian offer of arbitration, but were rejected by Germany and Austria, who only wanted war. So, after his analysis the Report ends in italics, saying that the war was premeditated by the Central Powers and conciliatory proposals were deliberately defeated.[109] In addition it is worth stressing that the Report considered Austria had suffered no wrong: "The act, committed as it was by a subject of Austria-Hungary on Austro-Hungarian territory, could in no wise compromise Serbia, which very correctly

---

[106] *Ibid.,* 98.

[107] *Ibid.,* 38.

[108] *Ibid.,* 15.

[109] *Ibid.,* 15–19.

expressed its condolences and stopped public rejoicings in Belgrade. If the Government of Vienna thought that there was any complicity, Serbia was ready to seek out the guilty parties."[110]

The view which the Report appears to represent was that war should be used only to defend a legal right, that every effort should be made to defend it firstly through peaceful means, and that, in any case, no legal right had been violated. Instead a country had chosen to treat the pretext of a legal violation to set off on a war of conquest. That should be punished as a crime. There were numerous very prominent legal and international legal names associated with the Report, including: *Robert Lansing, Sir Ernest Pollock, Nicholas Politis, Edouard Rolin-Jaequemyns, Albert Geouffre de Lapradelle.* There is a clear statement in Article 231 of an obviously legally binding treaty that Germany accepts that it has committed aggression. The argument of this article is that the perception of Germany abroad, partially induced by perceptions of German views of international law permitting wars of conquest, was that it did undertake a premeditated act of aggression.

Yet Article 227 appears to say that the German *Kaiser* can only be charged with a supreme offense against international morality and the sanctity of treaties, the latter being a reference to the guaranteed neutrality of Belgium and Luxemburg. Presumably with respect to both Article 231 and Article 227 the Commission Report says:

> The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reproves and which history will condemn, but by reason of the purely optional character of the institutions at the Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference.[111]

Brownlie comments, particularly with respect to Article 227, that

> the recommendations of the Commission were not adopted by the Peace Conference […]. This essay in positive morality with its undertone of vengeance was to prove embarrassing. In so far as it attempted to introduce morality into a new sphere it was courageous but not in harmony with the spirit of the time. In so far as it was openly

[110] *Ibid.*, 115.

[111] Commission On The Responsibility Of The Authors Of The War And On The Enforcement Of Penalties, Report Presented to the Permanent Peace Conference, AJIL 14 (1920), 95, 118.

> based on motives of international policy, it was open to the charge that there was no due process of law. […] Thus the Kaiser was not brought to trial but in the legal developments of the years 1943 to 1946 Article 227 was to have some value as a precedent.[112]

The present article is developing a position that substantial and authoritative German international law doctrine both before and after the war took it for granted that wars of conquest, and therefore of aggression, were illegal. It is now intended to show significant English and French international law doctrine did not realize this and assumed that German international law doctrine was part of the German intellectual consensus urging Germany to wage wars of conquest. The critical English and French literature help also to explain why it could seem natural for the Allies to have drafted Articles 227 and 231. All of the German literature still to be considered also accepts the same normative parameters but disputes, to a greater or lesser degree, their application to the particular facts.

So in the view of this article, not surprisingly, the German response did not question the normative parameters set by the Allies. Instead, they objected that the question of responsibility for the outbreak of the war cannot be decided by one side a party to the conflict, but only by an impartial commission of inquiry, to which all records are accessible and which decide the measure of each government's responsibility for the fact of the catastrophe. After disputing the Allied version of events and particular incidents, which were supposed to show premeditation to war, the German response, disputing the accuracy of these incidents, offered an alternative version of events. The primary factor was that the Central Powers were significantly outnumbered militarily by the Entente. Secondly, Germany did support Austrian military action against Serbia, but judging the Serbian response virtually satisfactory, had pushed Austria to negotiate. In this event, Russia became the key figure. It was pushing Serbia on a course of ethnic nationalist agitation, which had the aim to ensure the territorial disintegration of Austrian-Hungary. It effectively blocked German efforts at mediation through a decision to partially and then fully mobilize. The French themselves had long ago said such mobilization by Russia was equivalent to a declaration of war. Germany had to declare war quickly on Russia, as it would be the inferior military power in a two front war.[113]

---

[112] *Ian Brownlie*, International Law and the Use of Force by States (1963), 53–54.

[113] *Ibid.*, 31–43.

The factual accuracy of either this narrative or the Allied version of events is not crucial to the thesis of the present article. Instead there are particular excerpts of the response, and absences from it, which are especially pertinent. That is, Germany does not dispute that a war should only be fought to remedy a legal injury, nor that every peaceful means should be found to satisfy an injury before recourse to war. Again supposedly liberal international lawyers such as *Albrecht Mendelssohn Bartholdy*[114] and ultra prominent academics and intellectuals such as *Max Weber*, participated in the response. These would not readily put their names to the following phrases, unless a very elaborate conspiracy had been played upon them. "Plans of conquest were worlds removed from the thoughts of the leading German statesmen."[115] In particular it is the following phrases which lead directly back to the heart of this article:

> […] It is one of the most lamentable mistakes of a section of foreign public opinion that the reprehensible and irresponsible utterances of a small group of chauvinist writers should be regarded as the expression of the mental attitude of the German nation […]. It is a capital error to seek to place moral blame in quarters where in reality nervousness, weakness in the face of the noisy demeanour of the above mentioned small but unscrupulous group, and lack of ability to make quick unequivocal decisions in difficult situations brought about disaster.[116]

This brings us back to the writers about international law in pre-war Germany who were recognized abroad. This is why what was *typisch deutsch* or not about German international law doctrine at this time is probably of large historical significance, even although it may be difficult to measure that exactly. The picture that emerges clearly in Great Britain and France is that what may have been thought to be international law in Germany or its place in Germany did not make itself felt abroad, but that may reflect at most a failure of the German international lawyers already discussed to make their presence felt in Germany. As will be seen later, that is precisely a central issue in dispute.

A typical picture of how German international law was seen from abroad shortly after the World War is provided by *Sir Hersch Lauterpacht.* He considers Hegelianism to have been in the absolute ascendancy "[…] international law stood at the beginning of the present century at the point at

---

[114] *Hueck* describes him in these terms: "The liberal and cosmopolitan Albrecht Mendelssohn Bartholdy […] was forced to emigrate to England in 1934," *Hueck* (note 1), 205; *Max Weber* is of course regarded as a colossal international figure in the field of sociological thinking in the twentieth century.

[115] German White Book (note 105), 37.

[116] *Ibid.,* 39.

which it was left by Hegel with his conception of the State as an absolute end and of international law as external municipal law."[117] He goes on to mention the names of *Adolf Lasson* and *Erich Kaufmann.*[118] *James Leslie Brierly* also shared *Lauterpacht*'s view of the influence of *Hegel* within Germany. In his essay, which was the English version of his 1928 Hague Academy Lectures, he launches a general attack upon the consensual foundation for international law and he alleges that the most highly systematized form of the consensual theory is the Hegelian doctrine of the self-limitation of the State as developed by more modern authors such as *Jellinek.* By the doctrine of self-limitation a State may create law for itself in internal and external affairs. International law is not imposed on States from outside, but is merely the sum of the system of external public laws of the States concerned. For *Brierly* this is a denial of the legal character of international law. "[W]hat is commonly called international law consists merely of certain non-obligatory usages which states in fact follow in normal circumstances as a matter of convenience or from motives of enlightened self-interest […]."[119] In his *Standardwerk,* The Law of Nations, *Brierly,* having equated *Hegel* with *Jellinek,* equates *Jellinek* with Germany:

> […] Modern German writers do not shrink from facing the full consequences of the theory of a purely consensual basis for the law; they have inherited from *Hegel* a doctrine known as the "auto-limitation of sovereignty," which teaches that States are sovereign persons, possessed of wills which reject all external limitation. So that if we find, as we appear to do in international law, something which limits their wills, this limiting something can only proceed from themselves. Most of these writers admit that a self-imposed limitation is no limitation at all; and they conclude therefore that so-called international law is nothing but "external public law" (*äusseres Staatsrecht*) binding the state only because, and only so long as, it consents to be bound.[120]

---

[117] *Sir Hersch Lauterpacht,* Private Law Sources and Analogies in International Law (1927), 44.

[118] *Ibid.*, 45–46; *Lauterpacht* also cites *Heller*'s above discussed book (note 31) at 45. I have discussed *Lauterpacht*'s views more extensively recently in the forthcoming issue of the *Anthony Carty,* Hersch Lauterpacht, A Powerful Eastern European Figure in International Law, Baltic Yearbook of International Law 7 (2007) (forthcoming February 2008).

[119] *James Leslie Brierly,* The Basis of Obligation in International Law (1958), 13–14 (edited by *Sir Hersch Lauterpacht*).

[120] *James Leslie Brierly,* The Law of Nations (1928), 37–38. In the 6th and final edition in 1963, *Brierly* modifies the above quotation with an indefinite article. "[…] Some modern German writers *etc.* […]", 53.

At the time of the outbreak of war the importance of the ideological foundation of German foreign policy was stressed in the collective British document from Oxford University, Why We are at War. A whole final chapter is devoted to what the authors call, The New German Theory of the State.[121] The chapter begins: "The war in which England is now engaged with Germany is fundamentally a war between two different principles – that of *raison d'etat* and that of rule of law."[122] After describing the struggle in England in the seventeenth century against the Stuart Monarchy's absolutist pretensions, the authors continue: "The same antagonism now appears externally in a struggle between two nations, one of which claims a prerogative to act outside and above the public law of Europe in order to secure the 'safety' of its own state, while the other stands for the rule of public law."[123] For the rest the authors cite the *Machtstaatsgedanke* of which *Heller* speaks, and refer to *Fichte* and *Treitschke.* In particular they quote copiously from General *Friedrich von Bernhardi,* Germany and the Next War,[124] a disciple of *Treitschke,* also regarded, with *Erich Kaufmann* as the key immediately pre-war exponent of Hegelianism, in *Heller*'s work.[125] This material is used by the British historians to ground their assertion about the actual state of international law study in Germany, just as *Lauterpacht* and *Brierly* have done. No self-respecting State would sacrifice its own concept of right to any international rule, and, more importantly, there is the glorification of war: "war aggressive as well as war defensive."[126] *Bernhardi* is quoted as "speaking of the right of conquest of new territory inherent in a growing people" where "the dispute as to what is right is decided by the arbitrament of war."[127] The Professors express an understanding in extenuation that Prussia, not Germany, suffers a geographical pressure from her mid-European situation, which makes her feel strangled and has her struggling for breath. "Frontier pressure thus led to ruthless conquest irrespective of rights; and that tradition has sunk deep. It has been easier for England, an island State in the West, exempt from pressure, to think in other

---

[121] Oxford Faculty of Modern History, Why We are at War, Great Britain's Case (1914), 108–117 (Great Britain's Case).

[122] *Ibid.,* 108.

[123] *Ibid.*

[124] *Friedrich von Bernhardi,* Germany and the Next War (1914).

[125] *Heller* (note 31), 201–210.

[126] Great Britain's Case (note 121), 110–111.

[127] *Ibid.,* 113.

terms."[128] Nonetheless the Professors have to oppose that to the doctrine of the self-preservation of the State, "[…] the doctrine of a public law of Europe, by which all states are bound to respect the covenants they have made."[129] Sensitive to a German charge of hypocrisy, they nonetheless confidently conclude "[i]t is true that we have everything to gain by defending the cause of international law."[130]

For reasons of space it is not possible to give an exhaustive account of English writings at the beginning of the World War. However, brief mention should be made of the international legal historian, *Coleman Phillipson* who, once again, gave very extensive treatment of *von Bernhardi,* "because recently he has exercised such great influence in his country."[131] Once again the German international lawyers are absent. *Phillipson*'s main concern is with the German doctrine of necessity and the invasion of Belgium, which one is leaving aside in this article, since eventually it was not an action defended by the Germans at Versailles. Instead, one might stress how, from a historical perspective, *Phillipson* was satisfied that there was a public law of Europe since Westphalia and an international law, both of which prohibited a war of conquest. *Phillipson* stressed that law was not morality and that he was talking of the former.[132] Law meant the rules which States must observe, rather than morality, which meant merely what they ought to observe. When England began the war against France in November 1792 it was because it annexed the Austrian Netherlands, and, contrary to the Treaty of Munster, opened to all nations the navigation of the Scheldt.[133] Now the struggle is also a matter not merely of ethics, but of international law, which can only admit those wars which are made for self-defense and self-preservation.[134] So, now Great Britain is at war because of international law:

> […] we took up arms to prevent undue aggrandizement on the part of Germany, whose long contemplated intentions were none too well concealed (a reference to the above discussion of *von Bernhardi*). For to stand by and allow an aggressive country to subjugate one State and humiliate another […] would certainly have been

[128] *Ibid.,* 114–115.

[129] *Ibid.,* 115.

[130] *Ibid.,* 117.

[131] *Coleman Phillipson,* International Law and the Great War (1915), 36.

[132] *Ibid.,* 50.

[133] *Ibid.,* 47–48.

[134] *Ibid.,* 2.

> inconsistent with […] the duty of each State to do its utmost to preserve the common order […] and the established relationship of States and existing conditions which prevail conformably to the principles of international law and international practice […].[135]

The French reactions are similar, but more informed and penetrating. *Louis Le Fur* attributes huge significance for German policy of what he describes as German doctrines. He does not ignore the significance of legal doctrine in Germany, but he claims that all significant German legal writing is absorbed into a single, unifying radical subjectivism, which finds expression in an imperialist, because completely subjective, German nationalism. Again he means the equivalent of the triumph of the Hegelianism described by *Heller*, but attributes the villainy instead to *Luther* and *Kant.* Writing in 1937 he says the Germany of before the war, as now, has lost the notion of law in the traditional sense of the word, so that force reigns supreme among States.[136] Culture becomes so polarized among nations, that *Le Fur* sees a radical subjectivization in protestant German culture from the time of *Luther*. Private conscience and conviction are opposed to any objective, external reason, and the individual as well as the State are above and beyond any external judgment. This leads to a culture which vacillates between despotism and anarchy. *Kant* turned religious ideas into philosophy in overthrowing the natural law of the enlightenment, which *Le Fur* calls the authority of speculative reason and theoretical truth. There is no objective good, and for *Kant*, the law of one's conscience is completely subjective. This is the way to *Fichte* and *Hegel* and the idea that no law can transcend the human being. Law is always merely a subjectively accepted self-restraint. *Le Fur* makes a simple equation that in the absence of an objective rule, interest is the only guide and force the only limit to its realization.[137]

---

[135] *Ibid.*, 3–4 (note in parenthesis by the author).

[136] *Louis Le Fur*, Les Grands Problemes du Droit (1937), 312.

[137] *Ibid.*, 315–325. *Koskenniemi* offers a very exhaustive account of *Le Fur*'s views, part of a faith in a traditional philosophy and catholic religion, which he faults for a naivety, which saw the world in terms of philosophical doctrines confronting one another, *Koskenniemi* (note 13), 327. This is consistent with his overall method, which is to see an old civilisation overwhelmed by the events of modernity. While his treatment of *Le Fur* is extensive, he does not try to reconstruct any actual combat between the German and French, both of whom he describes as philosophers of international law. Neither have, in *Koskenniemi*'s view, arguments that have any real intellectual coherence and hence they are both doomed to extinction as was *Die Welt von Gestern. Koskenniemi* prefers the tone of pathos, describing *Le Fur*'s tradition as one born of another age, "a tradition that was silent about how to resolve the problems

Le Fur draws from *Kant*'s theory of law the elements which he claims have become central to German culture. The right of necessity is a licit action against someone who has done no wrong. Necessity has to be understood subjectively. He quotes an example from *Kant* of how one can push another away in a ship wreck, here the threat of an *uncertain* penalty, that is a court judgment of the death penalty, will give way to the fear of *certain* death through drowning. *Le Fur* relates this directly to the fear Germany experienced in 1914, which it felt justified it in violating Belgium's neutrality. An uncertain supposedly objective standard has to give way to a subjectively experienced concrete fear.[138]

There is a direct link between subjectivity of values and the choice of constraint as the only possible criterion of law. Such constraint does not exist at an international level and so States exist in a state of war. In the actual condition of things force is the only law among States. It is *Kant* who is at the origin of the idea that war is not submitted to law, as the warring parties mutually agree to suspend the obligation to follow it during the conflict. The States have the right to wage war, in the sense that they are free to subject to the hazard of arms the resolution of their difficulties. *Le Fur* sees this approach as consistent with the absence of objective natural law and resort at the State, as well as individual level, to the principle of autonomy. What makes a war just is the pure will of the parties. The two States, in *Kant*'s view, have agreed to war as a suspension of law.[139]

Le Fur goes on to blame *Kant* for the doctrine of preventive war. *Kant* is responsible for the argument that beyond the effective attack, there is the threat. In his theory of law, *Kant* says that, with respect to *menace*:

> Il faut y rattacher les preparatifs par lesquels un Etat prend les devants et sur lesquels se fonde le droit de prevention, et meme le simple accroissement d'une puissance qui se rend redoubtable par l'agrandissement de son territoire. Cet accroissement est, par le *fait* meme, et anterieurement a tout autre *acte* de l'Etat qui augmente ainsi sa

---

of a non-traditional age," *Koskenniemi* (note 13), 327. In fact *Le Fur*'s critique of subjectivity in German culture is offered again, in much more elementary terms by *Pope Benedict XVI* in a speech at Regensburg in 2007, when he equated German Protestantism and German philosophical idealism with the Islamic religion. What is being argued here is that all the ideas being considered have some intellectual cogency and continuing relevance. We do not live in historical boxes. *Le Fur*'s venom towards *Kant* is rather interesting given his iconic status among contemporary German legal and political philosophers, such as *Otfried Höffe etc.*

[138] *Le Fur* (note 136), 325.

[139] *Ibid.*, 329–333.

> puissance, une lesion faite aux Etats moins puissants et dans l'état de nature l'attaque est tout a fait juste.[140]

Of course, in *Kant*'s system it is left to subjective appreciation how threatening is an increase in a State's power.[141] The final stage of *Le Fur*'s argument is merely to say that turn of the nineteenth and early twentieth century German legal theory, theory of the State and theory of international law are all a product of this much earlier tradition of Lutheran Protestantism and Philosophical Idealism. *Savigny* and *Jhering* reduce law to the conscience of a single people. Conviction realizes itself in action, which makes the former effective.[142]

Law becomes the will of the sovereign, who limits himself through a doctrine of auto-limitation. This sovereign will is inherently without any limits it does not chose from time to time to accept itself. *Laband, Jellinek, Zorn, Kohler, Jhering* and others exercise an immense influence in confirming in new generations of Germans that there is no natural law of the objective good, but instead an acceptance of the pure will of the State.[143] *Le Fur* calls in aid *George Ripert* to bring together lawyers and historians such as *Lasson, Droysen,* and *Mommsen*, of whom *Heller* spoke.[144] The logic of this cult of force rests in subjectivity of appreciation of both interest and threat. Yet it is crucial that these theories, according to *Le Fur,* overthrow the idea that war is only a legal sanction and replace it with the idea that war is the source of law. The references are to *Treitschke, Lasson* and, once again, finally, *von Bernhardi.* Everything is the fatal result of denying any objective truth. Instead of war drawing its force from the law which it has to realize, it is the law which draws its force from the victorious war.[145]

This is a much more profound and systematic critique of German international law culture than that offered by *Lauterpacht, Brierly* and *Phillipson.* There is a vast French legal literature to back it up. *Le Fur* himself also cites *Pillet, Duguit* and many others. Brief mention may be made of the

---

[140] *Ibid.,* 333 (italics with *Kant*).

[141] *Ibid.,* 335.

[142] *Ibid.,* 360–363.

[143] *Ibid.,* 365.

[144] *Ibid.,* 366.

[145] *Ibid.,* 368–372, 376.

work of *de Dampierre* and *Combescure,* which are book-length.[146] The former work was translated into English. *De Dampierre* is an archivist rather than a lawyer, but his work is important, because its translation into English and publishing in New York may help to trace the climate which decided that wars of conquest were legally criminal and should be formally punished. The first two chapter titles set the tone: International Law versus German Imperialism and Violence as an Element in German Politics. *De Dampierre* explained that the view of Germany as an aggressive cultural monolith rather than a nation in the hands of a clique came with the notorious manifestos of the 93 intellectuals and the German universities.[147] There is a clear agenda here. "If the guilty nation should conquer by brute force, then it is the duty of all the other states signatory to the contracts which have been violated to frustrate the enjoyment of such a victory." Among the contracts is the Convention for the pacific settlement of international disputes, at the Hague Conference of 1907.[148] *Tannenberg* or *von Bernhardi* are descendants, by way of *Treitschke, Lasson* or *Ostwald,* of a long tradition of thinking. It is *Kant* who says that in matters of public interest it is not permissible for the scholar or the priest to reason.[149] International law is based upon the safeguarding of the commonweal, while Germanic ideas are of the legitimacy of conquest as the necessary expression of that force which alone conveys a right to existence.[150] The assertion of a right of conquest by Germany and its denial by the rest of the international community is *de Dampierre*'s central argument. He quotes *Lasson* from "Das Kulturideal und der Krieg,"[151] that disputes should not be settled by international congresses, but rather by the sword, the only rational and lasting solution. *De*

---

[146] Space and maybe level of importance exclude extensive consideration of *Gaston Combescure,* Les Deformations du Droit des Gens en Allemagne avant la Guerre (1918); the thesis was sustained at the Faculty of Law of the University of Paris under the judgment of *Antoine Pillet* and *Géraud de Geouffre de la Pradelle.* It constructed the usual picture of German international law as seen by those most vocal in Germany about its unimportance, *Treitschke, von Bernhardi, Hartmann* and *Lasson.* The mainstream German international lawyers completely fail to surface, despite the fact that the examiners must have known of them.

[147] *Jacques Marquis de Dampierre,* German Imperialism and International Law (1917), 19.

[148] *Ibid.,* 11–12; Convention for the Pacific Settlement of International Disputes, 18 October 1907, 205 Consol TS 233.

[149] *de Dampierre* (note 147), 23–24.

[150] *Ibid.,* 49.

[151] *Alfred Lasson,* Das Kulturideal und der Krieg (1868).

Dampierre says these ideas shocked in Germany when first published in 1868, but now they have become usual.[152] As *Le Fur* had noted as well, war had already been glorified in moral terms in German culture from *Kant* to *Nietzsche* and the chapter in *von Bernhardi*'s Germany and the Next War, "The Right to Make War," is only the final stage.[153] The tendency of this book is to create a climate of public opinion accustomed to the idea that there is a legal guilt attaching to German conduct in starting the First World War. *De Dampierre* concludes:

> The proved premeditation of a conquest of Belgium by the German armies reduces to vain pretexts all the elaborately constructed inductions and arguments of the apologists of Germanism. The indisputable historical fact is that the German Empire knowingly broke solemn engagements in regard to Luxembourg and Belgium, which she had entered into previously, of her own free will and without compulsion; and this is more than a repudiation of a treaty; it is an attack on International Law…all the more so because it also infringes the Hague Convention V defining the rights and duties of neutral powers […]. By these acts, the whole German empire, responsible for the policy of her leaders, has incurred not only a moral guilt, but also a material responsibility, which the co-signatories of the treaties of London and of the conventions of The Hague will be one day or other in a position to determine. The violations of territory which have taken place cannot be compensated merely by the damages awarded to the injured party (a civil party) – in this instance, Luxemburg and Belgium. A crime or misdemeanour involves, beyond the compensation for the damage caused, a punishment proportionate not for the extent of the damage but to the gravity of the fault. It is for the civilised world to constitute itself criminal jury in this trial, a trial without precedent in history.[154]

D. Some German International Law Reflections in the Course and after the First World War on the Causes of the War

The extent of responsibility for the First World War is still a hotly contested matter in German historiography, and it would be foolhardy for an international lawyer now to claim to speak with authority.[155] However, this article is not

---

[152] *de Dampierre* (note 147), 53.

[153] *Ibid.*, 50–56.

[154] *Ibid.*, 130–131.

[155] See the text mentioned later in this section, *Hans W. Koch* (ed.), The Origins of the First World War (2nd ed. 1984). This is a collection of differing German views translated into English for the benefit of those English scholars who write about the subject without any knowledge of German.

about those events. Instead it is a historiography of how they were handled by German international law doctrine and intended to encourage reflection about what international law doctrine can have the ambition to do. Hence some brief account of at least two approaches to the outbreak of war within German historical scholarship is helpful to situate the legal doctrine and assess its value. It is greatly to be regretted that for reasons of time and space, it has not been possible on this occasion to follow up a survey of two reflective German legal responses to the outbreak of the war, by looking also to several more abstract reflections on the place of war as an institution in the system of international law, which were made in the middle and closing years of the war.[156]

Already mentioned is the perspective of *Schöllgen,* that the German Empire was quickly warned by *Queen Victoria* of the danger of preventive war. In *Schöllgen*'s view, Germany was, in a manner of speaking, a victim of its foundation through force. It knew itself to be surrounded by States which were at least fearful, if not also resentful, and looking for revenge. It responded by trying to make as many defensive alliances as it could, with Austria-Hungary, Italy and, for a time, Russia. The idea was that each country would support the other if attacked by a fourth country. The difficulty was who should decide the meaning or extent of the notion of attack. Would it cover a Russian attack on Austria-Hungary, where Russia attacked Austria-Hungary so as to prevent some maneuver by the latter in the Balkans?[157] Underlying *Schöllgen*'s comment is the conviction that conflict between these two countries was inevitable and that Germany's interest was not truly involved in that conflict, *i.e.* in the Balkans. Instead, *Schöllgen* thinks Germany should have accepted an offer of support from England in 1898, even if it had meant a continuing subordinate role for a time on the world stage.[158] By rejecting the prospect of an English alliance and occupying itself with Austria-Hungary meant since 1901 Germany found itself on the defensive. With eight neighbors, Germany had no concept of how to prevent these from coming to an understanding against it. The solution was flight, "*Flucht nach vorn.*"[159] This made an inexperienced leadership susceptible to a nationalist mood, which, *Schöllgen* accepts, was well articulated by *von*

---

[156] *Kurt Wolzendorff,* Die Lüge des Völkerrechts, Der Krieg als Rechts-Institution und das Problem des Völkerbundes im Gedankensystem des Völkerrechts (1918); *Leo Strisower,* Der Krieg und die Völkerrechtsordnung (1919).

[157] *Schöllgen* (note 26), 28.

[158] *Ibid.,* 57, 85.

[159] *Ibid.,* 84.

Bernhardi.[160] By the time of the July 1914 crisis, Germany thought it had to support Austria-Hungary against Serbia, which was a real threat to Austria-Hungary. This support Germany would offer even if Russia supported Serbia. However, the *Kaiser* and Chancellor did hope to keep Russia out, especially after the conciliatory response of Serbia to the Austro-Hungarian ultimatum. The German military wanted a preventive war, on the ground that war for an encircled Germany was inevitable and Russia would be much stronger in a few years time.[161] These various grades of over-reactive and inconsistent insecurities worked against one another to produce what was technically a preventive war, with no clear goals, simply because Germany had in any case no concept of what it wanted, other than the vaguest anxiety of the need to break out of an undefined menace coming from all sides. An inexperienced and divided government machine launched itself on an aimless military adventure. It had somehow to defeat all the powers surrounding it, before they could launch a fatal attack.

This representation of Germany almost as victim is arguably a consistent and continuing conservative view that Germany as a nation repeatedly fails in terms of political maturity. Hence *Hans Peter Schwarz* publishes, with the same publisher as *Schöllgen,* his severe critique of German foreign policy up till 2005, with the title "Republik ohne Kompaß," the main argument of which is that Germany still has no idea of how to define its interests into any coherent strategy.[162] This is hardly a full-blown Hegelianism, and more resembles the perspective of the German White Book in 1919. It had already objected that one should not regard the reprehensible and irresponsible utterances of a small number of chauvinist writers "as an expression of the mental attitude of the German nation." However, they also say the German Chancellor, *Bethmann-Hollweg* had taken over a position "which demanded a degree of statesmanship and above all a strength of decision which on the one hand he did not sufficiently possess, and on the other hand could not make effective within the structure of the German State as it existed at that time. It is a capital error to seek to place moral blame in quarters where in reality nervousness, weakness in the face of the noisy demeanor of the above-mentioned small but unscrupulous group, and the lack of ability to make quick unequivocal decisions in difficult

[160] *Ibid.,* 87–88.

[161] *Ibid.,* 96–97.

[162] *Hans Peter Schwarz,* Republik ohne Kompaß, Anmerkungen zur deutschen Außenpolitik (2005).

situations brought about disaster."[163] In other words the English and French impressions of the place of international law in Germany, *i.e.* opinions of *Lasson, von Bernhardi etc.* are quite not completely without foundation, but they do not recognize that the German elites, which would include University Professors of Public Law, never rethought their concepts of international law with a view to waging wars of conquest and world domination. These professionals simply failed, for whatever reason, to combat those misrepresenting their discipline, before the outbreak of war. As will be seen in this section some of them exerted themselves somewhat after the outbreak of war.

A rather tougher assessment of the outbreak of the First World War comes from *Wolfgang Mommsen*'s "War der Kaiser an allem schuld?" This book is partially concerned with locating responsibility within the German State and opposes the theses of *John Röhl*, in Kaiser, Hof und Staat,[164] which treats the *Kaiser* himself as the decisive factor in decision-making. *Mommsen* considers the *Kaiser* was a significant part of a Prussian-German elite, but by no means in complete command and often overruled.[165] For reasons of space this extremely important distinction cannot be explored. It relates to the whole viability of the Hegelian model of the State as it came to be formally defined as State power (*Staatsgewalt*) incorporated in the Monarch as the formal decision-making organ of the State. This is vitally important because there was a so-called *Kriegsrat* of 8 December 1912, at which the *Kaiser* and the Army and Navy Chiefs considered the inevitability of war and discussed the idea of preventive war. *Lord Haldane* had let it be known that England could not tolerate the subjugation of France if a general war broke out as a consequence of Balkan unrest. As general war was increasingly likely through a Russian Austro-Hungarian conflict, it meant Germany had to reckon with England as an enemy. The *Kaiser* convoked his Council, at which it appeared to have been decided that a racial war between Slavs and Germans was inevitable and the question was when. The Army wanted a preventive war immediately and the Navy wanted to wait till the summer of 1914, when the Kiel Canal would be ready. *Mommsen* does not agree with *Fritz Fischer* that here is concrete evidence that

---

[163] German White Book (note 105), 39.

[164] *John C. G. Röhl,* Kaiser, Hof und Staat: Wilhelm II und die deutsche Politik (2002).

[165] *Wolfgang J. Mommsen,* War der Kaiser an allem schuld? Wilhelm II. und die preußisch-deutschen Machteliten (2002).

a decision to go to war was taken at this time.[166] *Mommsen* draws attention to the absence of the Chancellor from the meeting and says the meeting was insignificant. It did not even represent an embedding of the idea of preventive war in the mind of the *Kaiser.* A preventive war did, however, become part of the thinking of the Army.[167] That would count enormously when the *Kaiser* came to respond to the pressure of Russian partial and general mobilization at the end of July 1914. There is not time to consider whether German approaches to international law would have been influenced by the discretionary power of the Monarch, or instead, what should be the significance of the fact that power floated amorphously around and within an elite that had no clear institutional shape. The latter fact makes it difficult to assert that any idea of law would have mattered to either the form or content of decisions leading to war. However, *Mommsen* says there was unity among the elite to use the concept of the unlimited authority of the Monarch constitutionally as the means to shield them all, so as to legitimize themselves over against the parliamentary parties and public opinion.[168]

Notwithstanding these reflections, *Mommsen* comes close to a picture of the *Machtstaatsgedanke.* German elites had come to take it as a commonplace that the way for Germany to assert its world power position was through a sharpened arms race. The *Kaiser* had responsibility for the fact that by 1911 Germany was engaged in a "*maßlosen Wettrüsten* [...] *zur See und zu Lande*," for which he had popular opinion behind him.[169] *Von Bernhardi*'s book, Germany and the Next War (1912) was representative of an ever increasing opinion in German society that war was unavoidable, and so his concept of preventive war, expressed with rhetorical force, had great influence on the public. It all became a self-fulfilling prophecy.[170]

Finally, *Mommsen* substantially agreed with the Oxford Professors and the Versailles Commission Report about the character of German policy during the July crisis. At the time of the assassination Austria-Hungary decided on a military operation to dispose finally of the Serbians striving for a Greater Serbia, which would threaten the existence of the Monarchy. By the beginning of July

---

166 *Ibid.*, 197.

167 *Ibid.*, 194–196.

168 *Ibid.*, 224–225.

169 *Ibid.*, 186.

170 *Ibid.*, 201.

the view in Berlin was that one could not once again fail to back its ally without risking the alliance. So it was hoped that unrestricted support for Austria-Hungary would compel Russia to withdraw support from Serbia. Thereby the German leadership broke with its previous policy of pressing Austria-Hungary to an understanding with Serbia. The decision was to leave Austria-Hungary free with unqualified support, Germany remaining in the background but accepting responsibility for the risk in testing Russia's willingness to go to war. The strategy was explained to Austria-Hungary as "*Verteidigung eines ihres Lebensinteressen,*"[171] although it had not been clarified, if Serbia was responsible for the act. ([…] *obwohl noch völlig ungeklärt war, ob die serbische Regierung für diesen Gewaltakt überhaupt verantwortlich war*.")[172] *Mommsen*'s main interest is to demonstrate this was not a decision of the *Kaiser* alone, but a confident belief of the *Reichsleitung* that the war with Serbia could be localized. The Machiavellian calculus in Berlin was to deliberately give the impression abroad that one was not expecting a war. Hence, as the British Professors had noticed, the most senior figures, including the *Kaiser,* went on vacation in July. The Chancellor hoped to achieve a *fait accompli* in Serbia, and then resume friendly relations with the Entente Powers.[173]

As it gradually became clear that Russia was ready to fight, some hesitation and confusion entered into Berlin and Vienna. The English proposal of a four power conference was fatefully rejected by the Chancellor, but not before it was suggested to Vienna that the modalities of action against Serbia be discussed. The extent to which the Serbs went to satisfy the Austrian ultimatum led to hesitation by the *Kaiser,* but not firm enough to upset the course already decided. Austria wanted its war and declared it. The decisive step following this was the German, and especially the *Kaiser*'s attempt to put responsibility for the war onto Russia – its partial and finally full mobilization as the causes for the German declaration of war. The *Kaiser* expressed that such mobilization signified:

> England, Rußland und Frankreich haben sich *verabredet* den Österreichisch-Serbischen Konflikt zum Vorwand nehmend gegen uns den *Vernichtungskrieg* zu führen […]
>
> […] Das Netz ist uns plötzlich über den Kopf zugezogen und hohnlächelnd hat England den glänzenden Erfolg seiner beharrlich durchgeführten *puren antideutschen*

[171] *Ibid.*, 214, citing *Heinrich von Tschirschky*.

[172] *Ibid.*, 213.

[173] *Ibid.*, 216–217.

> Weltpolitik […] in dem es uns isoliert im Netze zappelnd aus unserer Bundestreue zu Österreich den Strick zu unsererer Politischen und ökonomischen Vernichtung dreht.[174]

Mommsen comments that this twisted the reality unrecognizably. The whole point of German maneuvers had been to test Russian willingness to go to war. The rest was detail. Germany's plan for a two-front war was to go through Belgium to attack France. Britain was asked to remain neutral. The rest is history.

Herrmann identified that *von Liszt* was one of the signatories of the "*Manifest der 93*" of 11 October 1914, which refused German blame for the war.[175] *Herrmann* points out that the main blame was put on England in the eleventh edition of his "Das Völkerrecht."[176] *Von Liszt* says that the express cause for the war was the murder of the Austro-Hungarian heir to the throne. The Austrian note to Serbia did not receive a satisfactory response, and Austria declared war on Serbia. The attempts to localize the war failed. "*Das englische Kabinett, in dessen Händen die Entscheidung über Krieg und Frieden ruhte, ließ dem Schicksal seinen Lauf. Die Mobilisierung der sämtlichen russischen Streitkräfte zwang das Deutsche Reich zur Kriegserklärung an Russland (1. August) und am 3. August erklärte der deutsche Botschafter in Paris, daß Frankreich durch Eröffnung der Feindseligkeiten das Deutsche Reich in Kriegszustand versetzt habe. Und als Deutschland, um einem französischen Überfall von Belgien aus zuvorzukommen, seine Truppen in Luxemburg und Belgien einrücken ließ, führte dies zu einer Kriegserklärung Belgiens und Englands an das Deutsche Reich (4. August).*"[177]

This text went to press in December 1917.[178] It may be inevitable that many German international lawyers would have been in no position to see through their government's strategy and would put the responsibility for the war on Russia or England.[179] However, one might be more inclined to share

---

[174] Cited from *ibid.*, 220.

[175] *Herrmann* (note 11), 129.

[176] *Ibid.*, 226.

[177] *Von Liszt* (note 90), 36–37.

[178] *Ibid.*, Preface, V.

[179] In particular to note is *Karl Strupp*, Die Vorgeschichte und der Ausbruch des Krieges, ZfVR 8 (1914), 655, 721, arguing that the aggressive intentions of Russia and France would have justified morally a preventive war, just as the great *Friedrich* was once so justified. However, the question did not arise because it was the Russians who

Koskenniemi's general argument that international lawyers were not equal to the catastrophic events of the twentieth century, or indeed, in my view, equal to anything very much at all.[180] Given the prominence of *von Liszt* one can hardly have imagined that even if the discipline of international law had been in Germany, or anywhere else, as strong in academic institutions as *von Liszt*, *von Bulmerincq* and others would have wished, that it could possibly have affected events. They were too mediocre as people to make any impression on their fellow countrymen. *Koskenniemi* remarks on *von Liszt*'s outrage when *Alberic Rolin* informed members of the Institute of International Law that owing to the impious war, the meeting scheduled for Munich had to be cancelled. *Von Liszt* responded that far from being impious the war was sacred and sent in his resignation. There was, *Koskenniemi* notes, a virtually complete withdrawal of Germans from the institute. He continues: "Nothing demonstrates the isolation and helplessness of the German international law community better than its turn inwards, and backwards, into nineteenth century debates about the basis of the law's binding force."[181]

Koskenniemi is aware of *Walther Schücking*'s "Die völkerrechtliche Lehre des Weltkrieges," in which, while the war is still raging, *Schücking* tries to assess its causes in a legal aspect. *Koskenniemi* gives a brief summary of it in the context of a much fuller account of his life. As throughout his work, *Koskienniemi* presents the book as an expression of the personal beliefs of the author, so "for *Schücking* any important conflict was bound to contain legal claims," but this did not have to mean inflexible methods of settlement, and *Schücking* believed the will to war could be controlled "by tying the parties to an efficient negotiating process."[182] Implicit in this description of *Schücking*'s work is *Koskenniemi*'s view of him as a naive idealist, believing in the rationality and goodness of men in "dark times." He quotes a contemporary as

---

forced this conflict on Germany. The style of this article is very emotive and partisan. *Strupp* devoted immense and more scientific energy to questions of Belgian neutrality, which are not within the scope of this article. See the study of *Strupp* by *Sandra Link*, Ein Realist mit Idealen – Der Völkerrechtler Karl Strupp (1886–1940) (2003), especially 72–91. This splendid work, a doctorate from Trier and part of the MPI for European Legal History Project exhaustively considers also *Strupp*'s views about the application of the laws of war, and in the context of controversies with scholars of the Entente Powers.

[180] *Anthony Carty*, The Decay of International Law (1986).

[181] *Koskenniemi* (note 13), 229.

[182] *Ibid.*, 219.

describing the man as "a great child, a pure heart and an incorrigible idealist."[183] This method of history writing polarizes woolly minded, liberal idealists against "dark forces of violence and reaction" and it creates a mood in the spirit of *Zweig*'s reminiscences. Overly sensitive souls (*Schönheitsgeister* or Sunshine People), arguably, deserve to become extinct. Instead, I would prefer to ask whether as an international lawyer, *Schücking* was able to make an intellectually credible strike at the issue of responsibility for the outbreak of the war.

A very substantial biography of *Walther Schücking*'s life and work has come out of Kiel Law Faculty itself and been published in the series of its Walther-Schücking-Institute. *Bodendiek* is primarily concerned with studying the man in the domestic German context of pacifist movements and campaigns to support international organization. The study considered here is barely mentioned.[184] The main emphasis of this exhaustive study is upon the difficulties *Schücking* had propagating his internationalist views in Germany. However, there is important mention of *Schücking*'s very hostile reaction to the guilt clauses of the Versailles Treaty and it is placed in the context of the general reaction of German international law science. The intensity of this reaction is treated as somehow an aberration by German scholars, not all necessarily mischievous, but nonetheless hopelessly blinded by nationalism. *Bodendiek* quotes *Michael Stolleis* that German international law science "*habe sich wie selbstverständlich in die vaterländische Pflicht genommen gefühlt.*" *Detlev Vagts,* from a German Social-Democratic family that went into exile in the United States, is cited as saying that seldom has a nation been so obsessed by a Treaty and German international law science shared this obsession. More to the point *Bodendiek* quotes a well received lecture by *Ernst Zitelmann,* to the German Society of International Law, that Germany was dragged guiltless into the war and then had its faith in a law among nations shattered, and for that the principal guilt rests not with Germany but with the Versailles Treaty itself.[185] Clearly *Zitelmann* and others are sharing the image of the Russian hordes that *von Liszt* and *Strupp* accepted. Hence, I would speculate that they would not have either known or understood that they were thought by their colleagues overseas to have contributed to the general de-legitimation of the idea of law and of

[183] *Ibid.,* 211.

[184] *Frank Bodendiek,* Walther Schückings Konzeption der internationalen Ordnung, Dogmatische Strukturen und ideengeschichtliche Bedeutung (2001), 94, pointing to difficulties that the book had with the wartime censorship.

[185] *Ibid.,* 198–199.

international law in Germany. What this article is trying to do is to explore legal arguments that were used on their merits. The key point is the interface between very traditional views about the nature of international law held by German international lawyers and the fact that international lawyers everywhere usually have no idea what their governments are really doing, whether in Germany in 1914 or in Great Britain in 1957 and 2003.[186]

Schücking's "Die völkerrechtliche Lehre des Weltkrieges" was completed in March 1917. In the Preface, Schücking warns that "*heute haben wir gelernt, wohin uns die 'Realpolitik' und der Kultus der Macht in Europa geführt haben.*"[187] *Schücking* begins with some general remarks. International lawyers repeat a thousand times the view of *Grotius* that war is a legal process, but once the war begins, it is a matter of existence. Now the Allies have the goal to dissolve the German Reich, while Germany plans the annexation of numerous countries.[188] Nor will he argue with what he calls so-called German intellectuals who preach war as a biological basic law or natural phenomenon, such as in a then recent article by *Prince Bülow*, appealing to the spirit of *Bismarck.*[189] Instead it appears *Schücking* understood to some extent, how the First World War came about and what institutional mechanisms were essential to prevent this kind of conflict from recurring.

Whatever the tasks of ethics or theology, the task of the lawyer is to devise forms for the peaceful solution to conflicts, which have the possibility to exclude the use of force.[190] *Schücking* says there are those naive spirits who believe the present conflict is a product of one side having prepared for years a detailed plan to launch a premeditated attack on the other, rather than the conflict being a final twist of long drawn out years of mutual hostility and arms races. Let anyone who believes such plans of attack existed produce them. There were war parties in every country, but the question is whether the responsible government instances were so disposed. Instead, it is the case that many of those within government were so worried about the unforeseeable consequences of a modern war that they did not want it. At the same time, the conviction that such

---

[186] See generally, *Anthony Carty*, Distance and Contemporaneity in Exploring the Practice of States: The British Archives in Relation to the 1957 Oman and Muscat Incident, The Singapore Yearbook of International Law 9 (2005), 75–85.

[187] *Walther Schücking*, Die völkerrechtliche Lehre des Weltkrieges (1918), vi.

[188] *Ibid.*, 6.

[189] *Ibid.*, 15–16.

[190] *Ibid.*, 18.

fear was present among all parties had led to a practice of reciprocal bluffing as a way of resolving concrete disputes, in the belief that the opponent would shy away at the last moment from risking war. This diplomatic style led to intransigence in negotiations, and however one wants to attribute the blame for causing the recent war, such is the context in which to see the Russian mobilization.[191] *Schücking* recognizes that is the focal point for popular German beliefs about the cause of the war.

To the dispute itself, *Schücking* takes it as given that Serbian officials knew of the assassination, Serbian weapons were used, the leader of the plot was a Serb official and connivance of frontier officials played a role. An issue of huge prestige was involved for Austria-Hungary and also indirectly for Germany. The threat of Greater Serb nationalism was known, as well as the desire of Austria-Hungary to subordinate Serbia. Austria-Hungary had a legal right that was injured. However, the international law position is clearly that Austria-Hungary should have requested atonement and guarantees for the future. Only after this, is one authorized to resort to force, a position *Schücking* supports by citing *Fauchille* and *von Liszt*, the main German and French authorities.[192] An arbitrator could have considered the elements of the ultimatum, even if detailed rules were not available to him. Serbia was a sovereign and equal State and there were questions whether the ultimatum was compatible with Serbian sovereignty, particularly the participation of Austro-Hungarian officials in judicial proceedings on Serbian territory and in the suppression of subversive activities against Austria-Hungary, for an indefinite period.[193] Russia and the Entente saw this as an attack on Serbian sovereignty and the Hague Arbitration would have had difficulty accepting it.[194] While Austria-Hungary may have set too sharp conditions in its ultimatum, nonetheless the tension with Serbia was so severe – other Powers do not seem to have been aware of the extent of the Greater Serbia propaganda in Serbia – that Austria-Hungary could not have suffered the likely loss of an arbitration and hence it is not surprising that it rejected the Serbian offer. One cannot say that it definitely thereby contradicted the modern idea of international law.[195]

---

[191] *Ibid.*, 22–23.

[192] *Ibid.*, to 37.

[193] *Ibid.*, to 49.

[194] *Ibid.*, 57.

[195] *Ibid.*, to 60–62.

The heart of *Schücking*'s book concerns the failure of mediation. He asks whether *Grotius* would have accepted Austria-Hungary using force, provided it was merely to obtain a remedy for the injury, but would also have justified Russian intervention to defend Serbia's sovereignty, if Austria-Hungary intended to infringe it. The problematic character of the Austro-Hungarian ultimatum was also that its very short timescale made it virtually impossible to localize the conflict, effectively forcing Russia's hand. Austria-Hungary's refusal of mediation was strictly legally possible, although one could argue under Article 2 of the Hague Convention on Peaceful Settlement of Disputes, this was required as far as circumstances permitted. Yet the Entente Powers blame the Central Powers for the war at this stage, *i.e.* because of the refusal of mediation, and clearly Austria-Hungary has taken on a huge responsibility for the outbreak of the war. So we have to understand the grounds for the behavior of the Central Powers.[196] England blames the Central Powers for causing the war by refusing Four Power mediation. It is true Austria-Hungary treated the conflict with Serbia as involving its own vital national interest and would not consider the wider danger to European peace. However, on balance *Schücking* is impressed by the argument that a Four Power mediation would not have been impartial, given the alliance between France and Russia, and that even England admitted (*Sir Edward Grey*) it could not be fully impartial, where Russia was concerned. [197]

The difficulty with the rest of *Schücking*'s analysis is that he appears to understand the last days before the war as ones of great confusion in which numerous proposals to negotiate were being made on all sides and where, at different times Austria-Hungary, Germany, England, Russia and Italy appeared to be making some concessions and putting everything back on the table. If at this final stage there is one Power *Schücking* considers had marginally the larger responsibility for making war inevitable, it was Russia with its partial and then full mobilization. It used the first stages of its mobilization to demand from Austria-Hungary an undertaking to do nothing to infringe Serbia's sovereignty.[198] He thought this clearly unreasonable as Russia offered nothing in return except to halt mobilization. What *Schücking* did not appear to know was that Germany had deliberately gambled on Russia not risking war. Also Germany and in particular the *Kaiser* had not focused attention on the

[196] *Ibid.*, to 81.

[197] *Ibid.*, to 105.

[198] *Ibid.*, 178.

inevitability of England's participation in the war against it. This was, however, clearer to Germany by the end of July, as the *Kaiser* also hesitated over what he thought the largely reasonable Serbian response to the Austro-Hungarian ultimatum. *Schücking* thought the conditions Austria wanted to impose on Serbia extremely unusual,[199] but that they could have been accommodated through some form of international commission. The intensity and confusion of the last minute diplomatic steps encouraged *Schücking* to think in future that no State should be allowed to begin a war without having to go through a compulsory mediation process.[200] However, this proposal was not a naive liberal belief in the value of mediation. He was aware of the possibility of the sceptics that on the one or the other side there may in fact be a hidden will to go to war. The development of international law to include compulsory mediation would still work in such an event, because such a secret will to war could only exist within governments and not in the general population. The effective development of this legal rule will exclude the possibility that governments could be misleading their populations that they are immediately about to be overwhelmed by their neighbors. Without such a strategy a government cannot win the support of the population that it must have to fight a modern war. The secret will to bring about a war can only exist on one side and categorical rules on mediation can make it impossible for a government in bad faith to work up a conviction in its' people that it is going to be overrun by an enemy.[201]

So *Schücking*'s narrative of the events leading to the outbreak of the war is largely driven by his own scepticism that a European war had been planned, although he is categorical that Austria-Hungary put the maintenance of peace among the Great Powers below what it took to be its national interest.[202] He places great weight on the situation, becoming critical with Russian mobilization, although he recognized that legally it was a sovereign right and a defensive measure.[203] He even appeared to suggest that the Russian military were so much in control of this process as to undermine negotiations between

---

[199] Not by today's standards, where it is usually assumed by peace loving Western countries that States harboring terrorists cannot be trusted to pursue them either by police or judicial action within their domestic jurisdictions.

[200] A provision eventually introduced into the Covenant of the League of Nations.

[201] *Schücking* (note 187), 222, especially 205 *et seq.*

[202] *Ibid.*, 83.

[203] *Ibid.*, 145 *et seq.*

the Tsar and the *Kaiser*.[204] All along, *Schücking* would have been aware, as *von Liszt* had stated, that it was the fear of Russian mobilization that had enabled the German government to sweep up popular support in Germany for war. However, the limits of *Schücking*'s knowledge of diplomatic events cannot take away from two important conclusions. He always thought it a possibility that a secret will to war actually existed. Secondly, his analysis of the legal situation always assumed that, should such a will have existed, it would have been illegal. He came very close to saying that the original Austro-Hungarian demands on Serbia took the form of an ultimatum and did not constitute an appropriate way to ensure the satisfaction for the injury which Austria-Hungary had suffered. If he had known the intention of Austria-Hungary was always to conquer Serbia and annex it, or otherwise to bring its political existence to an end, he would have declared that illegal, according to his understanding of contemporary international law. As *von Bulmerincq*, also he, *Schücking*, supposed that *Grotius* was the standard. It is worth repeating *Schücking*'s exact words on this:

> […] Wie hätte Grotius geurteilt? Er hätte zunächst grundsätzlich den Krieg von Österreich-Ungarn gegen Serbien gebilligt, soweit er wirklich nur bestimmt gewesen, eine entsprechende Sühne und Sicherung herbeizuführen […] Für den Fall, daß […] Österreich-Ungarn einen Feldzug gegen Serbien unternommen hätte, um die Gelegenheit zu benutzen, diesen Staat seiner Souveränität zu berauben, wie das von russsicher Seite behauptet wurde, hätte Hugo Grotius auch die russische Intervention zugunsten Serbiens als gerechtfertigt angesehen […].[205]

Schücking further deliberates about the question and implications involved when a State decides to force into submission another smaller State that has injured it but offers sufficient atonement. After citing *Travers Twiss*, *Kamarovsky* and *Grotius* again, *Schücking* appears to come down against the Central Powers:

> So kommen wir zu dem Resultat, daß wenn Grotius den Krieg Österreich-Ungarns gegen Serbien nach der Antwort auf das Ultimatum nicht mehr als einen gerechten angesehen hätte, er auch die russische Intervention vom Rechtsstandpunkt aus gebilligt haben würde.[206]

This conclusion is hardly a failure of liberal conscience or of German international law doctrine. It provides an at least fairly clear legal answer to the

---

[204] *Ibid.*, 201.

[205] *Ibid.*, 70–71.

[206] *Ibid.*, 71.

outbreak of the war, which is consistent with the mainstream of German international law doctrine before the outbreak of the war.

The second major juridical reflection on responsibility for the outbreak of the First World War will be *Kantorowicz*'s "Gutachten zur Kriegsschuldfrage of 1914."[207] This is perhaps a strange choice from the perspective of *Wissenschaftsgeschichte.* The author was not an international lawyer and the work was not even published until 1967. He was a very major legal theorist in the first thirty years of the twentieth century, responsible for the *Freirechtslehre*, which, given the very tortured intellectual history of Germany, has been thought by some to be a precursor to the arbitrary style of judgments delivered during the Third Reich. For a short while he enjoyed the distinction of a Chair in Law, like *Schücking,* at Kiel University. Yet, within the sphere of international law doctrine in Germany, it can certainly be said that *Kantorowicz*'s significance is "*gleich null*." My reason for thinking it should be a priority to have his book translated into English is that it is the most intellectually serious contribution to an understanding of the place of law in the outbreak of the First World War, and the best guide to how far the place of international law doctrine in Germany was both misunderstood abroad and unsuccessful in making itself felt at home. In other words the choice of this text is to point to debates in themselves of significance, because of their intellectual quality, both at the time of writing and now.

Geiss published *Kantorowicz*'s *Gutachten* for the first time in 1967 because he himself favored the view that Germany waged a preventive war. *Geiss* is himself criticized among German historians for paying no attention to what were the intentions of the other Powers. Even more categorically than *Mommsen, Geiss* shows that all of the figures at the fateful 8 December 1912 *Kriegsrat* wanted preventive war and that the Chancellor fell in with this soon after. The idea of considering *Kantorowicz*'s work is precisely to place him within, not outside, significant German historical scholarship and wider German intellectual debates, then and now.[208] *Kantorowicz* is simply a creative legal mind, who once turned a little of his considerable ability to international law. It

---

[207] *Kantorowicz* (note 30).

[208] See *Koch* (note 155), Introduction, 8, 25–26. *Koch* describes *Geiss* as *Fritz Fischer*'s most notable pupil. *Koch* reproduces in English translation a variety of German views for an English audience of historians who do not read German. *Geiss*'s contribution, see *Koch* (note 155), 46–85, for arguments for the theory of preventive war, especially 68–79.

is interesting that *Geiss* introduces *Kantorowicz* in terms even grimmer than *Koskenniemi*'s warning about *Schücking*. Standing virtually alone in the Weimar Republic *Kantorowicz* broke the taboo about German innocence in 1914, paying with a broken career and life, dying at a relatively early age in exile in Cambridge England in 1940. *Geiss* notes, ironically, for this article's title that *Kantorowicz*'s work was regarded as "*undeutsch.*" Instead *Geiss* identifies *Kantorowicz*'s striving, through various versions from 1923 onwards, to construct a rational and democratic culture in Germany around acceptance of responsibility for the events of 1914. *Kantorowicz* saw this undertaking as essential to the democratization of German society in the early 1920s as *Geiss* saw the same struggle continuing in the late 1960s.[209]

Kantorowicz accepts that in 1914 there was no formal legal concept that an outbreak of war could be illegal. Instead he will build his argument around what he calls *werdendes Völkerrecht*, measuring the existing law beside world peace, practicality and justice. The question is then whether particular countries waged what could be described as a justified war (*einen im Sinne des schon damals werdenden Völkerrechts nicht gerechtfertigten Krieg*), having full regard to the fact that such a growing international law is already powerfully present in the consciousness of peoples. *Kantorowicz* means nothing idealistic about such an expression. Instead he is thinking of actual public controversy in particular European societies, such as the Entente Powers and Germany. It is meaningless to try to banish the question of guilt out of the post-war world.[210] To illustrate these points *Kantorowicz* refers to the huge importance attached in Germany to the Russian general mobilization effectively against Austria-Hungary and Germany. Either this was reasonable because it was justifiable for Russia to come to the defense of Serbia, or it was not because such Russian support could not be justified. Assuming mobilization amounted to an intended attack, "*Alles kommt also* […] *auf die normative Frage der Rechtfertigung eines derartigen Angriffs an* […]."[211] This is how the subject was understood in German public opinion in August 1914 and after the Versailles Treaty. Without the threat from Russian mobilization there would not have been the general public consent to war, including the Social Democrats in the *Reichstag.* German public opinion, with *von Liszt* following in the train, thought the mobilization unjustified.

---

[209] *Kantorowicz* (note 30), 48–50.

[210] *Ibid.*, 99–101.

[211] *Ibid.*, 103.

The next stage of *Kantorowicz*'s legal construction is to draw from general principles of criminal law, not an existing code, but a thousand years of deliberation about the normative logic of reflection upon everyday life: such concepts as reflection, intention, carelessness, innocence, guilt, premeditation, instigation. There are basic criminal law concepts to be found among all civilized peoples (*Kulturvölker*). However, he draws a note of caution that such lay language cannot simply be applied to 1914 out of context, *e.g.* to say simply that Germany willed war in 1914. Such expressions are meaningless. Juridically, what does "Germany" mean, or what was it reacting to? Context is everything.[212] These apparently domestic criminal law concepts become central to the whole, completely original construction of *Kantorowicz*'s argument. He will break up the phenomenon of the outbreak of the war into three parts, the Balkans War, the Continental War and the World War. To each he will ascribe a different level of responsibility. The first involves the idea of deliberate intention, the second the idea of recklessness and the third the idea of carelessness.[213] However, it is necessary to return again to the issue of legality itself.

Kantorowicz stresses that his particular agenda is to comment on the position of the Entente Powers, who are responsible for the Commission Report.[214] He says that it is fact the Entente, and particularly Great Britain, that have chosen to see the war in legal terms. It is for them a legal process to respond to wrongs done by Germany.[215] *Kantorowicz* joins in the common German objection to the hypocrisy of particularly British policy, which is to cover State interest and advantage in legal language, but he does not treat this Entente practice as significant. The task he wishes to undertake is to offer a differentiated response to the question of German guilt. The Treaty has compelled Germans to acknowledge this guilt in legal terms. *Kantorowicz* very largely rejects the Treaty position, but remains with some very limited responsibility for Germany. Always unable to resist a style of black irony, *Kantorowicz* describes the responsibility as much less than that of Austria-Hungary. Vienna instigated Germany to help and Germany always saw itself as no more than that. At the

---

[212] *Ibid.,* 106–107.

[213] *Ibid.,* 208–209.

[214] *Ibid.,* 155 *et seq.* He refers with contempt to the French Professors on this Commission *Larnaude* and *de Lapradelle,* who came up with evidence of a forged letter of the *Kaiser, "also höchst qualifizierte Richter!"*

[215] *Ibid.,* 206.

end Berlin tried desperately to draw Vienna back. In the end whatever the guilt of the Central Powers, it is far less that that of other Powers in other wars, for instance the Italian attack on Turkey in 1911 or Rumania against Bulgaria in 1913. In italics he writes, "*Die Schuld an einem großen Krieg ist nicht notwendig große Kriegsschuld.*"[216] The problem is rather the extent of this war. "*Der Schaden des Weltkrieges war unermeßlich, die Schuld an ihm war es nicht.*"[217] He is aware of the general historiographical points which have been raised in this article and which concern how German international law doctrine was seen abroad. *Kantorowicz* dismisses the Commission Report allegations of aggression against Germany as without foundation. They reflect the influence of so many Germans, including academics after the war broke out, the unprecedented conditions of the Brest-Litowsk Treaty.[218] They also betray, through projection, the disgraceful intentions of the Entente towards the Germans. This was not a war the Central Powers fought out of *Machtgier or Raubgelüst*, but out of *Furcht und Verzweiflung.*[219] There was a certain amount of literature produced by what he disparagingly calls "our so-called German intellectuals," calling for World Empire, preaching the virtues of the *Machtstaatsgedanke*.[220] *Kantorowicz* is careful to discount the significance of general opinion for the assessment of criminal guilt of individual government officials. This has to rest on hard evidence, attaching to themselves particularly. That is the way he sets out his case with respect to German and Austro-Hungarian officials.[221]

German political culture was profoundly militarized and this will explain the importance of the preference which the Army generals always had for the idea of preventive war.[222] However, *Kantorowicz* makes a crucial distinction, that the German leadership was never in the grip of the language of *Machtstaatsgedanken.* The latter supposes that a country should consciously use

---

[216] *Ibid.*, 321.

[217] *Ibid.*

[218] Friedensvertrag zwischen Deutschland, Österreich-Ungarn, Bulgarien und der Türkei einerseits und Russland andererseits, 3 March 1918, reprinted in: Nouveau Recueil Général De Traités 10, Ser. 3 (1921), 773.

[219] *Kantorowicz* (note 30), 321–322.

[220] *Ibid.*, 289. He refers to "*die alldeutschen Kriegsziele Gemeingut der sogenannten Gebildeten.*"

[221] *Ibid.*, for example 263–270, 287–288, 295–298, 302–304.

[222] *Ibid.*, 134.

its superior economic and military strength to wage wars of conquest and thereby increase its power. In a sardonic tone which *Geiss* recognizes must have provoked the *Reichstag* that asked for the *Gutachten*, *Kantorowicz* discounts the role of *Machtstaatsgedanken,* in favor of a clumsy policy of inducing fear in neighbors without satisfying any defined German interest.[223] He realizes that this element of German *literati* were seriously responsible for giving the impression abroad that Germany planned long in advance a war of world conquest. The declarations of so-called intellectuals and professors once the war began increased this impression. Yet such intellectual activity must not be given a mistaken significance which then leads to a responsibility for Germany.[224] With this analysis *Kantorowicz* is effectively discounting all of the literature described by *Heller* and also criticized by the Oxford historians, the British and the French international lawyers mentioned here. He distinguishes himself from *Geiss*, who does consider that in their speeches and writings the German figures who appear in the reply to the Commission, such as *Hans Delbrück* and *Max Weber* and those present at the 8 December 1912 *Rat, e.g.* Admiral *von Mueller*, did think in expansionist *Machtstaat* terms.[225]

However, in determining the criminal responsibility of the German State, *Kantorowicz*, writing again in a very disparaging style that his contemporaries must have found irritating, describes how German foreign policy from the 1890s was recklessly driven by policies which infuriated all of its neighbors and which thereby carelessly, and without any clear concept of an advantage to Germany, created a widespread fear of Germany in the whole of Europe and led to its virtually complete diplomatic isolation.[226] This, in turn, created in the German leadership an increasing fear that they would be susceptible to attack from forces already much superior to them, and growing more superior by the day.[227] France and Russia alone were stronger and with Great Britain the constellation of forces was very unfavorable indeed. Added to that, the weakness of Austria-Hungary, Germany's last ally, was very serious. It was in mortal conflict with

---

[223] *Ibid.*, 318.

[224] *Ibid.*, 289–290.

[225] *Koch* (note 155), 50–54 ("German *Weltpolitik*").

[226] *Kantorowicz* (note 30), 141. *Kantorowicz* has in mind the provocative declaration by Holstein at the time of thee Hague Peace Conference, that Germany regarded the State as having no higher goal than preserving its own interest. Germany isolated itself on the question of arbitration.

[227] *Ibid.*, 294.

Serbia, whose Greater Serbia ambitions, supported by Russia, were incompatible with the continued existence of an Austria-Hungary that had absorbed a considerable part of the Western South Slavs into its Empire.[228] In other words *Kantorowicz*'s interpretation of the intellectual climate of pre-First World War Germany is fairly similar to *Schöllgen*'s, but expressed more sardonically, as in the hands of a petulant, incompetent and confused leadership. When this leadership plunged Germany into a completely unnecessary war, the fear of Germany shared by the rest of Europe and most of the world, turned to hatred.[229] Germany and Austria-Hungary could have taken a different course. The former could have abandoned its naval arms race. For Germany to come out on the world stage, it should have simply been willing to accept junior partnership for a while with at least one already existing World Power. Great Britain was the obvious choice.[230] Austria-Hungary could simply have taken the South Slavs into a triumvirate Empire, as the Hungarians had been absorbed in 1867.[231]

Within this wider context, *Kantorowicz* uses his concepts of criminal responsibility to determine the question of guilt for the events of 1914. Here it is a matter of attributing responsibility to the actions of particular individuals and groups of individuals acting in consort. At this stage *Kantorowicz* comes close to *Mommsen.* He may have been regarded as "*undeutsch*" within Germany, but in fact he very largely rejects the contentions of the Commission on Responsibility for the Authors of the War, reporting to the Versailles Peace Conference. It may be remembered that they attributed exclusively to German responsibility for having started, in a premeditated fashion, a war of aggression. *Kantorowicz* attributes the highest level of responsibility, deliberate intention to start a war, only to Austrian-Hungary's planned war against Serbia. He says the record of the actual decision-makers shows that the ultimatum to Serbia was intended to be rejected and the intention was to use military force to subjugate and effectively eliminate Serbia as a State. This was Austria-Hungary's project albeit it had Germany's backing. *Kantorowicz* is categorical that this is the first occasion since 1879 that a Great Power in Europe declares war and uses force in order to upset and change the balance of power (*Machtverhältnisse*) in Europe

---

[228] *Ibid.,* 292–294.

[229] *Ibid.,* 318.

[230] *Ibid.,* 317.

[231] *Ibid.,* 315.

significantly.[232] It was bound to be unacceptable to the other Great Powers and to provoke a reaction. Effectively this is a premeditated, planned war of conquest, for which Austria-Hungary is alone made responsible by *Kantorowicz.* It was premeditated as Germany and Austria-Hungary had been discussing this possibility for some time and the assassination of the heir to the Hapsburg throne was a mere pretext.[233] However, *Kantorowicz* does not deign to call this a product of *Machtstaatsgedanken.* Instead, he calls it a War of Desperation (*Verzweiflungskrieg*), the product of panic by a regime that knew itself close to collapse, because it had no strategy to cope with the principle of Slav nationality that was clearly a threat to its existence.[234]

Germany was responsible for what *Kantorowicz* called recklessness, exactly in the sense agreed to by a contemporary historian such as *Mommsen.* This is a criminal legal responsibility, but it does not amount to pre-meditated aggression.[235] It has to be said *Kantorowicz* is making a distinction here between a well conceived or focused policy to use State power to achieve definite goals, if necessary through conquest, and a reckless willingness to resort to "sword-rattling" as a way of bullying one's way through particular crises, whether Bosnia-Herzegovina or Agadir. In the latter sense Germany did follow a belief in *Machtpolitik.*[236] However, when Germany assured Austria-Hungary that it would go to war to support its ally in the event that Russia intervened on behalf of Serbia, this was not part of a pre-meditated plan to go to war. On the contrary, Germany's governors may well have convinced themselves that there was no prospect that Russia would intervene, because of internal divisions, because of lack of military preparedness or whatever. Nonetheless, in terms of criminal responsibility, this did not matter to *Kantorowicz.* Germany was willing to live with this possibility. It gave Austria-Hungary the blank check against Serbia, precisely on the understanding that come what may Germany would be at its ally's side. This was a criminal recklessness. This was inconsistent with previous German policy which, *e.g.* during the just terminated Balkan Wars, had not supported Austria-Hungary and called for a conciliatory

---

[232] *Ibid.,* 252.

[233] *Ibid.,* 150, 239; *Kantorowicz* sees 1914 as a repeat of the Bosnia-Herzegovina crisis of 1908, displaying the same careless threat of the use of force, the belief that the threat to use the sword could resolve conflicts.

[234] *Ibid.,* 287–289.

[235] *Ibid.,* 208–212.

[236] *Ibid.,* 138–139.

policy towards Serbia. The *Kaiser* was also eventually disturbed by the extent to which Serbia was willing to accommodate the Austria-Hungary ultimatum. Yet the fact remained that the assurance was given and eventually not withdrawn precisely because it was an assurance of honor given by one *Kaiser* to another.[237] *Kantorowicz* was at pains to stress that the defensive alliance of Germany with Austria-Hungary was irrelevant here, as Austria-Hungary was embarking upon an offensive war.[238] Indeed there is an irony in the events of 1914, if one remembers the obsession of *Erich Kaufmann, Adolf Lasson* and others, going back as far as *Hegel,* with the need to dishonor the pledged word, the non-binding, or non-legal character of agreements. In fact Germany was embarking on a war it could see was becoming of very doubtful advantage to it, precisely because, in *Kantorowicz*'s view, the *Kaiser* had made a promise to the Austrian Emperor, *Franz Josef,* which he regretted but felt he could not disown. *Kantorowicz* stresses that Germany knew it was in uncharted waters, with a certainty of Great Britain's participation in the war, but there was no going back on the word of the *Kaiser.*[239] The conclusion of this argument was addressed to German public opinion. Everyone in Germany, particularly Social Democrats, and including expressly the author himself, thought they were being overwhelmed by reactionary Tsarist Russian hordes, when in fact the German Government had reckoned all along with the possibility of Russian intervention and determined to endure it, as the price of a decisive defeat of the Southern Slavs in the Balkans.

Finally, *Kantorowicz* considers Germany was criminally careless in plunging itself into a World War, which was the significance he attached to the participation of Great Britain. The argument here is based upon the fact that *Kantorowicz* is certain it never occurred to the German authorities until very late in July 1914 that the participation of Great Britain on the side of the Entente was most likely. *Kantorowicz* thought this very careless indeed. Austria-Hungary was even more careless, in thinking that as an old friend Great Britain would never go to war with it.[240] They should have known, from British support of France in the Morocco crisis, the rapprochement with Russia since 1907 and indeed the so-called *Kriegsrat* of 8 December 1912, which was provoked by

---

[237] *Ibid.,* 255–259.

[238] *Ibid.,* 235.

[239] *Ibid.,* 255–259.

[240] *Ibid.,* 245–246, 273, 277.

British assurances that they would not stand by and let France be defeated.[241] The panic in Berlin at the end of July did lead to three days of feverish German diplomacy to persuade Austria-Hungary to modify its stance towards Serbia and to bring it into negotiations with the Russians. There was also considerable German effort to persuade the Russians to hold off from intervention, particularly direct exchanges between the Tsar and the *Kaiser*.[242] This must all have served to create the impression, at every level of German society, including the leadership, that Germany did not want war. However, the crisis was, in *Kantorowicz*'s terms, brought about by criminal carelessness of the German Government. Germany could still have stopped the war by simply telling Austria-Hungary it would not support it in a war with Russia and assuring Russia of this fact. This would certainly have been in Germany's so-called State interest, if one took a *Machtstaatsgedanke* perspective. However, in fact Germany was trapped by the *Ehrenwort* des Kaisers.[243] Here also the importance of the military and their preference for the doctrine of preventive war came decisively into place. The Army considered Germany needed the advantages of speed and the military initiative to make up the preponderance of numbers that the French and the Russians, and now also the English enjoyed. How far the idea of preventive war could play a role would depend, and did at the end of July 1914, on the relative weight of the Army in the *Reichsleitung.* That would be huge at this point in time, because Russian mobilization, with a background of the French alliance, meant *von Moltke* was pressing desperately for action.[244] The whole idea of preventive war became the black comedy, that having induced fear and even panic in large numbers of opponents, who otherwise had no actively aggressive intentions towards you, you have to launch preventive attacks on them individually before they can unite against you.[245] The military actively ignored and overrode the last minute indecisive attempts of the *Kaiser* to intervene to stop the military timetable to war.[246] Yet the military imperative

---

[241] *Mommsen* (note 165), 197–198.

[242] *Ibid.*, 217–220.

[243] *Kantorowicz* (note 30), 255–259.

[244] *Ibid.*, 196, *Geiss* offers an extended footnote at this point, *ibid.*, 196–197, to demonstrate that preventive war was deeply ingrained in Prussian-German military thinking and played a vital part in the final stages of the crisis. It had however already come to the minds of the whole *Reichsleitung* in the feverish three years before the war, since the Agadir crisis.

[245] *Ibid.*, 299–300.

[246] *Mommsen* (note 165), 207.

had always been embedded in the political. If one has to fight, then the attack has to be preventive, because the balance of forces are against us. In that event the mad logic becomes that one cannot keep waiting to see if one has to fight. Such deliberations would have left *Hegel* and his followers *von Treitschke, Lasson* and *Kaufmann* bemused.

In conclusion, *Kantorowicz* has provided, in my judgment, the intellectual creativity to grasp the entire panorama of Germany's legal responsibility for war at a time of the transition from the *Kaiserreich* to the Weimar Republic. He, along with *Walther Schücking,* shows, how the terrible social and cultural tensions of Germany in 1917–1923 stimulated a creative response to a situation which the relatively mediocre, but otherwise harmless German pre-First World War scholarship could not have anticipated. The only failure of the latter, in its mediocrity, was not to rise to the challenges presented both by the irresponsibility of German so-called intellectuals and political thinkers and also to the serious immaturity of the political leadership of their country. Yet, in not rising to these challenges German international lawyers behaved much as their colleagues at home and abroad have behaved before and since. Figures like *Schücking* and *Kantorowicz* will always be exceptional in any profession. It is always difficult from within a profession to tackle problems which require knowledge and understanding outside that profession. That is why the pursuit of *Wissenschaft* and its *Geschichte* is often not very rewarding.